

## **MEMORANDUM**

December 5, 2006

TO: Ad Hoc Agricultural Policy Working Group

FROM: Marlene Michaelson, Senior Legislative Analyst  
Jeff Zyontz, Legislative Attorney  
Amanda Mihill, Legislative Analyst

SUBJECT: December 11, 2006 Meeting

Our next meeting is scheduled for December 11, 2006 from 4:00 p.m. to 6:00 p.m. in Room A at the Upcounty Regional Services Center. Attached are additional background materials for this meeting. These include the following:

- Minutes from the November 6 meeting.
- A letter from the Chairs on the procedures for review of the Draft. Please review this immediately for important dates.
- A clean draft of the entire report. This is identical to the chapters you have received over the past week but omits the red-lining that highlighted changes made by each sub-group.
- A memorandum staff prepared at the Vice-Chairs request summarizing relevant features of TDR programs in other jurisdictions around the country.

**AD HOC AGRICULTURAL POLICY  
WORKING GROUP MINUTES**

Monday, November 6, 2006

4:00 P.M. to 6:59 P.M.

Up-County Regional Services Center Room A

**PRESENT**

| <u>Working Group Members</u> |                          |
|------------------------------|--------------------------|
| Lib Tolbert, Chair           | Scott Fosler, Vice-Chair |
| Wade Butler                  | Margaret Chasson         |
| Jim Clifford                 | Nancy Dacek              |
| Jane Evans                   | Robert Goldberg          |
| Tom Hoffmann                 | Jim O'Connell            |
| Michael Rubin                | Pam Saul                 |
| Drew Stabler                 | Billy Willard            |

| <u>Montgomery County and State Staff</u>                   |                                    |
|--|------------------------------------|
| Jeremy Criss, County Department of<br>Economic Development | Marlene Michaelson, County Council |
| Amanda Mihill, County Council                              | Callum Murray, M-NCPPC             |
| Doug Tregoning, County<br>Cooperative Extension            | Jeff Zyontz, County Council        |

**ABSENT**

|             |              |
|-------------|--------------|
| Bo Carlisle | Wendy Perdue |
|-------------|--------------|

**GUESTS**

|   |  |
|---|--|
| Khalid Afzal, M-NCPPC   | Pamela Dunn, M-NCPPC   |
| Shondell Foster, County Council                               | Sherry Kinikin, County Council                               |
| Kathy Reilly, M-NCPPC   | Chris Sasiadek, M-NCPPC                                      |
| Alan Soukup, County Department<br>of Environmental Protection | John Zawitoski, County Department<br>of Economic Development |
| Vince Berg  | Sue Carter   |
| Barry Clifford  | Jane Hunter  |
| David Tobin   | Jim Troy   |
| Lois Stoner   |  |

The Group had before it the November 1, 2006 memorandum with attachments from Marlene Michaelson, Jeff Zyontz, and Amanda Mihill.

The Group approved the minutes for the October 23, 2006 meeting with the following changes:

- Correct the spelling on Lib Tolbert's name.
- Remove Sherry Kinikin's name from the list of guests attending.
- On page 2, under "Staff Policy Paper on Pending Legislation", replace "Private Educational Institutions" with "Private Institutional Facilities".
- On page 3, after third sentence, add sentence indicating that one Group member suggested allowing the owner of a child lot home to lease the child lot home to their children.
- On page 3, first sentence under "Creation of a child lot after death of the property owner", replace the phrase "children should be allowed to create a child lot" with "a child lot can be created for a child".
- On page 3, under "sand mounds" replace the second, third, and fourth sentences paragraphs with the following: "Several alternatives were proposed to limit the number of sand mounds that should be allowed: one sand mound per 50 acres; allowing any property under 50 acres a single sand mound, regardless of size; and allowing sand mounds only for minor subdivisions. The latter suggestion would limit the number of sand mounds to five, regardless of the size of the property."

### **Transferable Development Rights Program**

The Group discussed the status of the County's transferable development rights (TDR) program. The Group agreed that the current TDR program needs to be strengthened and tentatively recommend the following:

- Extend TDR receiving capacity into mixed-use zones. The Group believes that this is a high priority.
- Extend TDR receiving capacity into commercial zones; however, these new receiving areas should only be eligible to purchase buildable TDRs once the BLT program is created. The Group believes this is a high priority.
- Create TDR receiving capacity when zoning density is increased in floating zone applications/local map amendments. The Group believes that this is a high priority.
- The Council should change its policy to ensure that master plans take every opportunity to maximize the number of receiving areas. The Group believed that there should be an assumed use of TDRs for each site when there is a proposed increase in density unless there is a compelling reason not to use TDRs. The Group felt that the burden of proof should be to prove why TDRs are inappropriate, not why TDRs are warranted.
- The County should work with local municipalities to establish inter-jurisdictional TDRs to create receiving areas in municipalities. One Group member mentioned that the City of Rockville is currently revising its zoning laws and this may be a good opportunity for the County and the City to work to establish this program. Several Group members suggested that the County may need to provide municipalities with incentives (or consequences) to encourage participation in an inter-jurisdictional TDR program.

- Eliminate the requirement in single family zones that receiving areas use 2/3 of the possible TDRs.

Further, the Group agreed that that the County should continue to consider requiring TDRs for private institutional facilities (PIFs), senior housing, and affordable housing, but not as a high priority. Group members believed that time and effort should first be spent implementing their other recommendations related to the TDR program.

Several Group members were unsure as to whether the County could increase density in the Agricultural Reserve even if a property was covered by a TDR easement. Therefore, the Group tentatively recommended requiring a supermajority of Councilmembers (6) to increase density in the Agricultural Reserve.

### **Public Water to Child Lots in the Rural Density Transfer Zone**

The Group discussed whether public water should be extended to child lots in the Rural Density Transfer (RDT) zone. The Group tentatively recommended amending the language in the Ten-Year Comprehensive Water and Sewerage Plan to allow public water to child lots in the following circumstances:

- When the child lot can be served from an **existing, abutting** water main and service to the property would not provide the opportunity for service to other RDT properties.
- When public water service can be provided in a manner that would not prevent the future application for a State or County easement for farmland preservation (e.g., if public water is provided on the edge of a lot and would not jeopardize application for the rest of the property).

The Group recommended that Council action, rather than administrative approval, be required for a category change for properties that qualify for public water under this recommendation. Group members noted that they believed there were very few properties that would qualify for public water under their recommendation, but recommended that the County monitor the use of public water to child lots to be sure this assumption is correct. The Group agreed that further action may be needed if the number of property owners using this recommended provision was significant. One Group member did not support this approach and would have recommended prohibiting public water to child lots altogether.

### **Sand Mounds**

The Group continued their discussion of sand mounds. The Group discussed at length a new proposal to allow one sand mound per 25 acres for the first 75 acres and one sand mound per 50 acres beyond that (e.g., a property owner with 125 acres but less than 175 acres would be allowed 4 sand mounds; a property owner with 175 acres but less than 225 acres would be allowed 5 sand mounds).

Group members had the following comments:

- Several Group members noted that they could agree with this proposal **if** the building lot termination program was implemented.
- The Final Group Report must discuss the regulatory history regarding the designation of sand mounds as an innovative or conventional system.
- One Group member argued that whatever the sand mounds policy implemented, it must not detrimentally affect a landowner's balance sheet (i.e., be "balance sheet neutral").
- One Group member suggested that the County require standards for routine maintenance of sand mounds.

### **Principles for Final Report**

The Group discussed the framework for the introduction chapter of the Group's Final Report and agreed to include the principles outlined by Council staff with the following changes:

- On principle 1, revise principle to emphasize that while agriculture, open space, and environmental protection work together to preserve the Agricultural Reserve, the Group's focus was on protecting agriculture
- On principle 1, replace the generic percentage (one-third) with the actual acreage of the Agricultural Reserve.
- On principle 3, add language referencing the building lot termination program and other easement programs, and clarify what is meant by the terms "equity" and "value".
- On principle 4, switch the first and second sentences and add the word "traditional" before the word "agriculture".

The Group confirmed that the next meeting would be on December 11, 2006.

### **Education Program**

The Group agreed that an education program for **all** County residents was an important tool to preserve the Agricultural Reserve. The Group agreed that the existing agriculture-related committees should be involved in the development of an educational program, which could include strategies such as:

- Signs indicating the boundaries of the Agricultural Reserve
- Pamphlets
- Events
- A "speaker on call" list
- Coordination with Montgomery County Public Schools,
- Special programs for after-school children's groups and seniors
- Public service announcements,
- Advertising

- Cable television programming
- Websites
- Expanding the cooperative extension service
- Expanding the Agricultural History Farm Park

### **Audience Comments**

Audience members submitted the following comments:

- Fragmentation of the Agricultural Reserve: A comprehensive look at 1/2 acre, 5 acre, commercial, industrial pieces in the RDT, special exceptions, how does this impact the large contiguous parcels?
- Regulations related to sand mounds appear to be counter to the Master Plan. Will the Master Plan need to be opened and amended to accommodate these changes?
- Is changing the 1 per 25 acre zoning discriminating against large landowners?
- Is there a need for impervious surface limits for the RDT regarding special exceptions?

Minutes written by Amanda Mihill, Legislative Analyst

F:\Land Use\Agriculture\Minutes\November 6, 2006.Doc

Dear Ag Group Members:

Thanks to all the subgroups for the extraordinary effort you have given in editing the various draft chapters. You have put us in a strong position to now move toward the completion of our report.

All members of the Group by now should have received the recommended changes to each chapter from the sub-group responsible for that chapter. We hope you have had time to review these comments in preparation for our next meeting on Monday, December 11<sup>th</sup> at 4 pm at the Up-county center. As you know, we have also scheduled a second meeting for December 18<sup>th</sup> if it is needed. I recently talked with the Council leadership about the timing of our report, and they were quite firm that they would not grant any further delay. So we need to focus on completing our work in a timely fashion to produce a high quality and useful report. To accomplish this, Lib and I propose we use the following procedure.

The staff will send everyone a “final draft report” consisting of the edited chapters submitted by each subgroup. The only editorial notes that will appear in this draft will be those in which a sub-group specifically flagged an issue to be brought before the entire Group (such as remaining questions to be discussed or proposed substantive changes in the draft that differ from what the Group had decided earlier), as well as some stylistic editorial notes. If you want to see how this draft differs from the earlier ones – that is, what changes the sub-groups have made – refer to the earlier chapters the staff sent which “tracked” those changes. Also, to further facilitate your review, we have asked the staff to compile a list of issues where the subgroup comments appear to deviate from the Group’s preliminary decisions as reflected in the minutes. While the subgroups were assigned the task of editing the drafts to assure that they complied with what the Group had decided, there will understandably be differences of opinion and interpretation as to what the Group had decided in the first place, and whether the subgroup edit accurately reflects the Group’s intent.

When we meet on Monday, we will take this new “final draft report” to be our base final report, unless specific changes are made to it. We therefore ask that each of you send *specific language changes* (that is, specific word changes in the text) you propose the Group make in the “final draft report” to the staff by Friday so that these can be compiled and form an agenda for us to work from on Monday. We understand that this is a very short turnaround, so if you cannot get your proposed changes to the staff by Friday, try to do so as early on Monday as possible. And if you can’t send them on Monday, bring them with you to the meeting on Monday afternoon, preferably in a written form that can be easily distributed to the entire Group (if you can make copies for everyone that would be good, but we will also be able to make copies at the meeting). In those instances where a subgroup has suggested additional discussion of a given issue, we ask that that subgroup – or individual members of that subgroup – suggest specific language changes they would propose be made to the final draft report.

We will attempt to separate the editorial and substantive proposed changes, so that we might approve the former all together. Then we will take up each of the proposed substantive changes, and attempt to find a consensus position on it. (If anyone believes a given change to be “substantive” and not just “editorial” we will categorize it as “substantive” and take it up before

the entire Group.) If we cannot reach a consensus on a particular issue, we will vote the proposed change up or down. Remember that everyone will have an opportunity to file a dissent on specific issues if they so choose to do so (with a maximum of one page per person of dissents and comments of reservation or clarification).

We understand that many of the substantive issues before us would benefit from further extensive consideration and discussion. However, since our time is extremely limited, we need to use our best judgment at this point in an effort to conclude what we agree on and what we don't. We will also need to make some stylistic decisions. For example, the subgroup editing the BLT chapter has proposed a format quite different from the rest of the draft report, so we will have to reconcile those different approaches.

In summary, we ask each of you to do the following:

- 1) Review the "final draft report" that the staff will send you.
- 2) Send your proposed *specific language changes* to the staff.
- 3) Bring any further proposed *specific language changes* with you to the meeting on Monday in a form that can be easily distributed to the entire Group.
- 4) Be prepared to concisely consider and decide the issues as we take them up on Monday.

Again, many thanks for the extraordinary substantive effort and cooperation everyone has shown. We look forward to seeing you on Monday.

Scott



**D R A F T**  
**12-5-06**

**FINAL REPORT**  
**OF THE**  
**AD HOC AGRICULTURAL POLICY WORKING GROUP**  
**MONTGOMERY COUNTY, MARYLAND**  
**2007**

## CONTENTS

INTRODUCTION AND SUMMARY OF RECOMMENDATIONS

CHILD LOTS

SAND MOUNDS

BUILDING LOT TERMINATE PROGRAM

TDR PROGRAM

PENDING LEGISLATION

RIGHT TO FARM ISSUES

FOLLOW-UP ISSUES (*note to subgroup that the follow-up issues chapter will include the recommendations on design standards*)

## **INTRODUCTION**

The County Council appointed the Ad Hoc Agricultural Policy Working Group in April 2006 to “provide comprehensive advice on ways to ensure the long-term protection of the Agricultural Reserve and preservation of our agricultural industry. The focus of the Agricultural Policy Working Group is the Rural Density Transfer zone. There are \_\_\_\_acres zoned RDT. State and county parks make up\_\_\_\_acres of that acreage.

In particular, the Council charged the Group with addressing a cluster of specific and inter-related issues by performing the following tasks:

- Undertake a thorough review of pending and potential legislation concerning the Rural Density Transfer zone, the child lot program, the proposed building lot termination program, uses of sand mound technology, and technical tracking and use issues associated with the Transfer of Development Rights program;
- Assure that this review provides a clear understanding of how the individual proposals interact with each other and considers the potential for unanticipated negative consequences;
- Proceed in a way that respects the concerns of all stakeholders; and
- Update the Council on its progress and submit a final report to the Council within calendar year 2006.

The 15 members of the Group represent very different backgrounds and philosophies about the Agricultural Reserve and property rights. We are farmers, property owners, representatives of organizations, former elected officials, and citizens. Even with these differences, we share both a belief that the Agricultural Reserve is valuable to all the County’s citizens and a common interest in preserving agriculture in Montgomery County. This positive approach created a productive and conciliatory environment in which we sought consensus on creative and practical solutions to difficult problems. Part of the process of finding common ground led us to identify principles on which all members could agree, and which provided the underlying rationale for our recommendations. These principles include the following:

### **GENERAL PRINCIPLES**

1. The economic viability of the agricultural industry is critical to the preservation of the Agricultural Reserve. Open space and environmental protection, which are important goals of the Agricultural Reserve in their own right, are unlikely to be achieved unless we can assure the health of agriculture.
2. Agriculture in the County has and will continue to evolve and requires an environment that recognizes that fact.
3. The equity farmers hold in their property is not only important to them personally but an important asset for their businesses, and consequently an important factor in the success of the agricultural industry in the County. Any new program or policy to discourage

development must be evaluated in terms of its impact on farmers' financial viability. Programs that provide equity in lieu of development (such as building lot terminations or transferring development rights in exchange for payment) are an important means of preserving this equity. The county government should identify options for funding these programs either through the public sector (e.g. farm land preservation tax, general obligation bonds) and/or the private sector (e.g. super TDR program).

4. Fragmentation of farmland should be avoided. Contiguous areas of farmland are desirable for traditional agriculture.

While we spent most of our time focusing on the specific issues identified by the Council, we also examined a few additional issues including whether there is a need for right-to-farm legislation, design guidelines, and educational programs. We took seriously the charge to look comprehensively at issues. We made every effort to understand the inter-relationship of issues raised by pending legislation and proposals. We also attempted to identify the full range of issues related to the Agricultural Reserve, both to understand comprehensively the specific and interrelated tasks the Council assigned us, and to build a checklist of issues that will need to be addressed by others if the Agriculture Reserve is to survive and flourish.

The Group worked hard to achieve compromises and consensus. Our recommendations do not always reflect an ideal solution from any one member's perspective, but offer proposals that are generally acceptable to the entire Group. (In those instances where Group members could not endorse a consensus position, we invited them to register their dissent (or to otherwise clarify their position) in comments that are indicated in the text and included at the end of the report.) Our ability to identify these compromises was based on the fact that we all support the continued protection of the Agricultural Reserve and the future of farming in the County. Collectively, we believe the Group's recommendations will significantly improve protection of the Agricultural Reserve, while not asking any single party – whether property owners in the reserve or other County residents and taxpayers – to unduly bear the cost of this protection. If implemented, we believe our recommendations will accomplish the following:

- Allow the continued use of child lots intended for the children of farmers (but with greater assurance that those lots will be owned by the children of the property owner, and will not prevent future use of a significant portion of the property for farming);
- Limit the use of sand mounds, decreasing their potential use by as much as one-fourth.
- Create a building lot termination (BLT) program to limit further residential development in the Agricultural Reserve while providing an acceptable level of equity to property owners giving them the resources that may be needed for farm investment; and
- Improve the TDR program, including expanding it to all commercial and industrial zones (including Research and Development zones), mixed-use zones, and floating zones, and creating a separate component to help support the building lot termination program.

***Group members – please confirm(see more detailed section in the body of this chapter)***

The Council asked for our advice as to how these proposals interact with each other. We believe that our recommendations strike a careful balance, reducing the total amount of development possible in the Agricultural Reserve, while at the same time creating a new opportunity to compensate landowners for further limitations on development. Funding of the building lot

termination program, which compensates property owners as an incentive to prevent development, is critical as an offset to the additional limitations recommended for sand mounds and child lots. Moreover, the BLT program could prevent potential construction of future sand mounds.

The Group met a dozen times between May and December, including a tour of the Agricultural Reserve, in order to meet the Council's deadline to finish our work by the end of 2006. Group members also met in smaller groups throughout the process in order to better understand one another's perspectives and develop new ideas and consensus. We trust that we fulfilled the charges given us by the Council in the time allotted, even if we were not able to address every detail. We have identified important follow-up issues that will require further review and work, and urge the Council and/or Planning Board to give these matters your priority attention. Implementation of our recommendations for the BLT program will not only require follow-up work, but also will depend on the County's commitment to identify options for funding this program either through public sector (e.g., Farmland Preservation Tax, General Obligation Bonds) and/or private sector (e.g., the buildable TDR program). In the course of our work, we came upon numerous recommendations from prior working groups that have not been addressed, and urge the County government to address the full range of issues that, taken together, will determine the future of the Agricultural Reserve.

Montgomery County can take pride in the establishment and the success to date of its Agricultural Reserve, an unparalleled gem of a resource that benefits all the County's residents, and indeed the Washington metropolitan area as a whole. But we cannot take its future success for granted. We urge the Council, Executive, and Planning Board to actively support the education of all County residents as to the importance of this critical resource. And we thank the Council for the opportunity to make what we hope will be a contribution to its continued success.

## **CHILD LOTS IN THE RDT ZONE**

### **SUMMARY**

**ISSUE: Should the Zoning Ordinance or practices concerning child lots be changed?** The Zoning Ordinance allows for lots for children of property owners; however, language on child lots in the Rural Density Transfer (RDT) zone is unclear and subject to multiple interpretations. Questions have arisen about the wording and the intent of the Zoning Ordinance with regard to density and use. Additionally, there are no restrictions on the transfer of child lots to third parties after building permits are issued. If child lots can be immediately transferred, they may be an incentive to build more houses than may otherwise be built. Finally, there are conflicting provisions in the Master Plan for the Preservation of Agriculture and the Comprehensive Ten Year Water and Sewer Plan regarding whether or not public water is available for child lots.

**We recommend continuing the use of child lots in the RDT zone.** We believe that the child lot provision is an important means to preserve and promote agriculture by allowing children to farm with their parents on the family farm. **We recommend the County Council amend the Zoning Ordinance to clarify the density provisions for child lots, ensure ownership by the child, and protect farmland.**

**We recommend the maximum density of subdivisions with child lots be one lot per child in addition to the base density allowed in the RDT zone.** This has been the practice of the Planning Board since the RDT zone was established. To limit the use of child lots for improper purposes, **we recommend the following limitations on child lots:**

- **A child must own the child lot for five years.**
- **A child must not lease the child lot home for five years.**
- **A landowner can create only one child lot for each child.**
- **A child lot can be created after the death of the landowner if there is a written indication of the landowner's intent to create the lot.**
- **A majority of the land on parcels with child lots must be reserved for agriculture.**

To facilitate the implementation of the ownership requirement and leasing prohibition, **we recommend additional written documentation and recordation at different steps in the planning process.**

**We recommend limiting circumstances in which public water can be provided to child lots to the following:**

- **When the child lot can be served from an existing, abutting water main and will not allow service to others.**
- **When public water service can be provided in a manner that would not prevent the future application for a State or County easement to preserve agriculture.**

**We recommend the County Council be required to approve any request for public water to a child lot in the RDT zone rather than allowing administrative approval.**

## **GROUP DISCUSSION AND RECOMMENDATION**

### **RELEVANT LAWS AND REGULATIONS**

There are two exemption provisions in the Zoning Ordinance for creating child lots in the Rural Density Transfer (RDT) zone:<sup>1</sup> (1) through the Maryland Agricultural Land Preservation Program (MALPF)<sup>2</sup>; and (2) in the process of subdivision.

#### **MALPF Child Lots**

The Zoning Ordinance limits the creation of MALPF child lots to the number of development rights assigned to the property.<sup>3</sup> There is no mention of the relationship between MALPF child lots and overall density. The Zoning Ordinance does not specifically state that MALPF child lots are exempted from area and dimension requirements. Therefore, MALPF child lots can never produce more lots than allowed by the underlying zoning density. [Move this paragraph to line 80].

The Maryland Agricultural Land Preservation Program promotes the creation of easements on agricultural land through the Maryland Agricultural Land Preservation Foundation (also referred to as MALPF). MALPF easements are more restrictive than zoning. The easement itself becomes the guiding document which details what permissible density there is (if any) and under what circumstances that density can be achieved.

The MALPF Program permits lots to be released from the MALPF easements “only for the landowner who originally sold an easement, 1 acre or less for the purpose of constructing a dwelling house for the use only of that landowner or child of the landowner, up to a maximum of three lots.”<sup>4</sup> For MALPF child lots, “the resulting density on the property shall be less than the density allowed under zoning of the property before the Foundation purchased the easement.”<sup>5</sup> By regulations, the County Planning Board must approve MALPF child lots,<sup>6</sup> which is done during the subdivision process.

Under the negotiated easement sold by the landowner through MALPF, the transfer of a child lot to a third party is prohibited within five years from the release of the MALPF easement, unless a transfer is specifically approved, such as for death or bankruptcy.

---

<sup>1</sup> Child lots are also allowed in the Rural Cluster and Rural zones. Child lots are a “grandfathering” of development rights for some long-time landowners whose property was down-zoned.

<sup>2</sup> Montgomery County Zoning Ordinance, §59-C-9.74(a). The Maryland Agricultural Land Preservation Program’s primary purpose is to preserve sufficient agricultural land to maintain a viable local base of food and fiber production for the present and future citizens of Maryland. The Program consists of two basic steps: the establishment of agricultural preservation districts, and the purchase of perpetual agricultural conservation easements. The Maryland Agricultural Land Preservation Foundation administers the easement program.

<sup>3</sup> Id.

<sup>4</sup> Maryland Code, Agriculture §2-513(b)(2).

<sup>5</sup> Maryland Code, Agriculture §2-513(b)(3)(i).

<sup>6</sup> Code of Maryland Regulations (COMAR) 15.15.01.17(c)(1)(c).

### Subdivision Child Lots

The Zoning Ordinance provision permits an “exemption” of lots “for use for a one-family residence by a child, or the spouse of a child, of the property owner”.<sup>7</sup> In order to create a child lot, the following conditions must be met:

1. The property owner must establish that he or she had legal title on or before the approval date of the sectional map amendment (January 6, 1981) which initially zoned the property to RDT;
2. This provision applies to only one lot for each child of the property owner; and
3. Any lots created for use for one-family residence by children of the property owner must not exceed the number of development rights for the property.<sup>8</sup> (There is no mention of the relationship between subdivision child lots and overall density.)

Subdivision child lots “are exempt from the area and dimensional requirements of section 59-C-9.4 but must meet the requirements of the zone applicable to them prior to their classification in the [RDT] zone.”<sup>9</sup> Before zoned RDT, properties in the Agricultural Reserve were zoned Rural, which has a density of one dwelling for every five acres.

### Density in the RDT Zone

Generally, the maximum density in the RDT zone is one dwelling unit per 25 acres. Section 59-C-9.41 specifically excludes farm tenant dwellings and accessory apartments, but not child lots, from that density limitation.<sup>10</sup> Section 59-C-9.4 states that the density limits in the RDT zone “apply in all cases, except as specified in . . . the exemption provisions of section 59-C-9.7”,<sup>11</sup> which include child lots. For “subdivision” child lots, the only exemption specified in the exemption provisions of 59-C-9.7 is from “area and dimensions”, not density.

There are two ways to create lots in the Zoning Ordinance: (1) exceptions to density (pre-existing parcels and child lots as a matter of practice); and (2) regular density (“market” lots). **The Zoning Ordinance is unclear on whether density for child lots is in addition to the general permissible “market” density of one dwelling for every 25 acres.** The Zoning Ordinance does not specify whether excepted dwellings are the exclusive way to develop or that development can use both ways of creating lots. The overall density allowed on a parcel differs depending on whether only one method is allowed or both methods are allowed.

### Child Lots Use

The Zoning Ordinance permits the creation of a child lot “for use for a one-family residence by a child, or the spouse of a child”.<sup>12</sup> The Zoning Ordinance defines “use” as follows: “Except as

---

<sup>7</sup> Montgomery County Zoning Ordinance, §59-C-9.74(b)(4) (emphasis added).

<sup>8</sup> Id., §59-C-9.74(b)(4).

<sup>9</sup> Id., §59-C-9.74(b). The Zoning Ordinance does not specifically state that MALPF child lots are exempted from area and dimension requirements.

<sup>10</sup> Id., §59-C-9.41.

<sup>11</sup> Id., §59-C-9.4.

<sup>12</sup> Id., §59-C-9.74(b)(4).



otherwise provided, the principal purpose for which a lot or the main building thereon is designed, arranged, or intended, and for which it is or may be *used, occupied, or maintained*.”<sup>13</sup> The Zoning Ordinance does not limit the ownership of child lots or the transfer of child lots to third parties, and it does not require any notation on the record plat concerning child lots.

## ACTIVITY UNDER THE EXISTING LAW

Since 1981, 95 child lots have been created within 46 subdivisions in the RDT Zone. That averages approximately two child lots per plan when a subdivision plan contains child lots. Child lots represent 18% of the total number of lots created in the zone. Planning Board staff and Department of Economic Development staff developed an inventory of RDT properties eligible for child lots. The best available information suggests that there are 99 RDT zoned properties at least 10 acres,<sup>14</sup> that have not transferred ownership since January 6, 1981.<sup>15</sup> The number of children a landowner has limits the number of potential child lots. Based upon the experience of the program to date, approximately 198 child lots are likely to be created in the Agricultural Reserve.

The child lot provision will be a self-extinguishing program. The number of landowners that have owned property in the RDT zone since 1981 will diminish to zero over time. The number of children from that set of owners will peak at some point in time (if it has not done so already). There is still an open question on whether a child lot can be created by a will (after the death of a long time owner) when property is owned with rights of survivorship. Given the existing text of the Zoning Ordinance, this question can only be answered when a County agency has the opportunity to interpret the word “title”.<sup>16</sup>

Allegations of abuse of the child lot provisions have arisen and are a result of differing interpretations of provisions in the Zoning Ordinance highlighted above on pages 2 to 4.

### Current Planning Board Zoning Ordinance Interpretations

Since the establishment of the RDT zone, the Planning Board has interpreted the Zoning Ordinance to allow child lots *to exceed* the density allowed in the RDT zone and to allow child lots *in addition* to the base zoning density permitted in the RDT zone (e.g., if a landowner has 3 children on a 25-acre parcel, current Planning Board interpretation would allow the landowner 4 lots; base density would allow the landowner only 1 lot). **The Planning Board has considered changing this interpretation.** The Planning Board requires a property owner to retain one transferable development right (TDR) for each lot.<sup>17</sup> The combination of child lots and base density may not exceed the total number of TDRs available for the property.<sup>18</sup>

---

<sup>13</sup> Montgomery County Zoning Ordinance, §59-A-2.1 (emphasis added).

<sup>14</sup> A property smaller than 10 acres is not entitled to create a child lot.

<sup>15</sup> On January 6, 1981, a Sectional Map Amendment was adopted that downzoned land in the Agricultural Reserve from one house per five acres to one house per 25 acres.

<sup>16</sup> The Planning Board has not been presented a subdivision with the issue of child lots created after the death of an owner; this question arose in a Planning Board staff proposed zoning text amendment.

<sup>17</sup> Montgomery County Planning Board, “Plowing New Ground”, page 10 (2001).

<sup>18</sup> Planning Staff memo, Ganassa property, February 16, 2006.

When a subdivision application includes child lots in the RDT zone, the Planning Board requires an affidavit from the landowner stating that any lot created is for the owner's child or the spouse of a child.<sup>19</sup> The Planning Board also requires an affidavit at record plat confirming that the building will be for the use of the owner's children or spouses of the children. More recently, building permits are being checked to ensure that the permit is being issued to the child of the property owner. There have been instances where the County has refused to issue a building permit on a child lot to someone who is not the child of the landowner.

There have been no prohibitions or restrictions placed on the sale of child lots by the Planning Board at the time of subdivision approval. The Planning Board is discussing changing this practice.

## **GROUP RECOMMENDATION TO REMEDY THE PROBLEM**

**We recommend continuing the use of bona fide child lots in the RDT zone.** Group members believe that child lots are an important means to promote family based agriculture. They provide a way for children to live on their parent's land and help farm on the family farm or simply allow children to be near their parents. Further, they are a source of compensation, in addition to TDRs, for the loss of equity landowners experienced during the 1981 downzoning. Because the current Zoning Ordinance is unclear regarding the framework for the child lot provisions, **we recommend the County Council amend the Zoning Ordinance to clarify when child lots are allowed.** Regarding density, **we recommend the maximum density of subdivisions with child lots be one lot per child in addition to the base density allowed in the RDT zone** (one house per 25 acres). [Use the exact same words on lines 21/22, lines 151/152, and 181-183. We also recommend giving a couple of examples to make the application of the rules 100% clear.]

### **Limitations**

To clarify the intent and limitation of the child lot program, **we recommend the following additional requirements:**

- **The child must own the home constructed on the child lot for five years. When a dwelling unit is built, the child must own the lot at the time of building permit and must continue to own the dwelling unit for five years after construction.** If a housing structure is already on the property, the child must live in the housing structure for five years after creation of the child lot. [This requires clarification.] **We recommend enforcement of the ownership requirement be resolved through a title search at the time of sale.**

**Follow-Up Required** Should penalties be required for violations? Yes – but the penalties must be appropriate and enforceable. Also, which part of the County government would handle the enforcement?

---

<sup>19</sup> This long-standing practice is not a literal requirement of the Zoning Ordinance.

- **Do not allow a child owning a child lot home to lease the home for five years after construction.** One Group member supports allowing the owner of the child lot home to lease the child lot home to their children (i.e., the grandchildren of the original landowner). We discussed requiring the child to occupy a child lot, but agree that monitoring occupancy could be difficult. **For enforcement, we recommend the Department of Permitting Services (DPS) develop a “complaint-based” enforcement mechanism.** Under this system, DPS would follow-up with any complaints filed. We feel more extensive enforcement options are too costly, may invade privacy rights, and are not worth the effort.

*Follow-Up Required* Should the landowner’s child be allowed to lease the house to another family member? [This needs to be discussed.]

- **A landowner can only create one child lot for each child.** We strongly feel that a landowner is only entitled to one child lot per child regardless of the number of properties a landowner has. In other words, we feel that a landowner is not entitled to one child lot per child for each property the landowner has.
- **A child lot can be created after the death of the landowner if there is a written indication of the landowner’s intent to create the lot.**

*Follow-Up Required* What type of written documentation would satisfy this requirement? Suggestions include a will or affidavit.

- **We recommend requiring a majority of land on any parcel be reserved for agriculture and prohibited from development.** This requirement would probably have no impact on large properties where the number of children is limited but could limit the size or location of child lots on small parcels. For example, an owner of 25 acres with 2 children would have to keep the one market rate unit and child lots on 7.5 acres if the goal were to preserve 70 percent of the property in agriculture. We believe that this provision should not result in a decrease in the potential number of child lots.
- Clarification on the above section (lines 227 to 234) is needed. What impacts would it have? How is the percentage calculated?

*Follow-Up Required* What percentage of the land should be maintained in agriculture? One suggestion was to require 70% of a small parcel be farmable land, including woodlands. We believe Planning staff should consider what the specific percentage should be.

We believe care must be taken to adequately ensure that these recommendations are adhered to. Therefore, to facilitate the implementation of the ownership requirement and leasing prohibition, **we recommend establishing the following procedures:**

- **The record plat must indicate that the property contains a child lot.** To this end, the Planning Department must require a covenant to be recorded in the land

- records at the same time the plat is recorded.** The covenant should contain a provision indicating that the house must be owned by the child for five years after construction and may not be leased during that time. Violation of the covenant should have penalties.
- **The building permit must be issued only in the child’s name.** The building permit should not be approved until DPS has determined that the child has signed an affidavit noting the limitations on ownership and leasing and knowledge of the covenant.

***Follow-Up Required:*** What penalties should be required if the covenant is violated? The penalties must be appropriate and enforceable.

***Group members – this was not explicitly recommended by the Group; you suggested that ownership be enforced via a title search. This new language provides the mechanism to record the limitations in the land records so that it will show up during a title search.*** Yes – the land records should reflect this.

We considered some limits that we determined were unnecessary because of the other recommendations set forth in this chapter. We do not recommend limiting the creation of child lots to property owners with land in agricultural production. Group members feel that any landowner who owned land during the 1981 downzoning should be allowed to create child lots, regardless of whether the land is in agricultural production. We also do not recommend establishing a sunset date for the child lot provisions. Group members generally feel that a natural sunset date already exists when the landowners from the 1981 downzoning either pass away or sell their property. Therefore, we feel that an arbitrary deadline is unnecessary. Further, although we support allowing a child to create a child lot after the death of a landowner, we do not believe that there should be a time limit on the child’s ability to create the lot because child’s lifespan will serve as a natural time limit.

## **PUBLIC WATER TO CHILD LOTS**

### **Relevant Laws and Regulations**

The Master Plan for the Preservation of Agriculture recommends **denying** “public water and sewer service to areas designated for agricultural preservation that utilize the” RDT zone.<sup>20</sup> The Comprehensive Ten Year Water and Sewer Plan provides, “[c]ommunity [public] water service may be provided to support the subdivision of lots for the children of the owners of qualifying properties.” Further, the Water and Sewer Plan notes that “[w]ater service in these cases is generally intended to be provided from abutting water mains, although water main extensions can be considered where those extensions are consistent with the requirements for large lot development . . .”<sup>21</sup>

<sup>20</sup> Maryland-National Capital Park and Planning Commission, “Approved and Adopted Preservation of Agriculture and Rural Open Space Functional Master Plan”, page 59 (October, 1980).

<sup>21</sup> Montgomery County, “Comprehensive Ten Year Water and Sewer Plan”, Chapter 1, § II.E.9 (2003).

## **Group Recommendation**

We support confirming the provision in the Water and Sewer Plan to allow public water service to be provided but with amendments to limit the applicability so that this provision would only be used in limited circumstance. **We recommend amending the language of the Water and Sewer Plan to allow public water to child lots in the following circumstances:**

- **When the child lot can be served from an existing, abutting water main and service to the property would not provide the opportunity for service to other RDT properties.**
- **When public water service can be provided in a manner that would not prevent the future application for a State or County easement for farmland preservation.**<sup>22</sup> Properties receiving public water are not eligible for state easement programs or the BLT program as described in Chapter x. This could increase the appeal of residential development (at 1 unit per 25 acres) over preservation through an easement program.

We make this recommendation based on the assumption that there are only a small number of potential child lots that would qualify for public water under our recommendation. **Once implemented, we recommend the County monitor how many lots are utilizing this provision.** If it appears that a significant number of lots are being provided with public water, we would urge the County reconsider this policy.

**We recommend that the County Council approve any request for public water to a child lot in the RDT zone by a majority vote.** One Group member supports requiring a super-majority of Councilmembers (6) to approve a requested change. The approval could be handled administratively if the criteria for approval are made crystal clear. For example, define abutting (10 ft. or 10,000 ft?).

## **NEXT STEPS**

The Planning Board should draft a zoning text amendment that would clarify the Zoning Ordinance and impose limitations on the use of child lots in the RDT zone.

The Planning Department should begin requiring a covenant to be recorded in the land records when a child lot is created specifying that a house on the child lot must be owned by the child for five years and must not be leased.

The Department of Environmental Protection should develop a monitoring mechanism to track how many child lots are utilizing public water.

The Department of Permitting Services should continue ensuring that building permits for child lots are approved only for the landowner's children and begin developing a complaint-based enforcement mechanism to respond in situations when the owner of a child lot leases the home.

---

<sup>22</sup> For example, if public water is provided on the edge of a lot and would not jeopardize application for the rest of the property.

Additional matters:

The ability to rent a child lot home must allow for bona fide hardship cases which need to be defined. Hardship circumstances could include foreclosure of the property, death of the child, serious incapacity, and callup for military service. Which body would make the final decision on a hardship matter?

It must be stated how TDRs used for child lots are disposed of.

What is the minimum number of acres required to create a child lot? What is the maximum size for a child lot?

We do not understand the two different types of child lots described on page 2. Also, there needs to be a clear statement that there are two different and distinct types of child lots.

## **SAND MOUNDS**

### **SUMMARY**

**ISSUE: Should the use of sand mounds be prohibited or limited in the Rural Density Transfer (RDT) zone?** The Zoning Ordinance limits density in the Rural Density Transfer (RDT) zone to one unit per 25 acres. Development in this zone is likely to yield less than the base density, especially without the use of sand mounds due to sewer limitations (e.g., when land is unable to perc). The use of sand mounds can potentially increase the total number of buildable lots in the RDT Zone. This, in turn, could potentially increase the fragmentation of agricultural land.

**We recommend that the County continue to permit sand mounds, but limit their potential use.** Our recommendation recognizes the competing interests between retaining value in farmland for the purpose of sustaining farmers and retaining large tracts of land where agriculture can dominate activity. **We recommend that sand mounds be allowed as follows: One sand mound per 25 acres for the first 75 acres. Beyond that, one sand mound should be allowed for every 50 acres of land.** For example, a property owner with 125 acres but less than 175 acres would be allowed 4 sand mounds; one with 175 acres but less than 225 acres would be allowed 5 sand mounds, etc. *Note that this was the last option discussed by the Group – but there was no vote or formal affirmation so we would like Group members to confirm that this is your recommendation.* Subcommittee believes this is correct.

In addition, **we recommend sand mounds be allowed under the circumstances** listed below, provided that a subdivision of a parcel existing as of December 1, 2006 shall not operate to increase the number of sand mounds allowed for the original parcel

- **Where there is an existing house and the sand mound would not result in the development of an additional house.**
- **When it enables a property owner with approved deep trench system percs to better locate potential houses to preserve agriculture.**
- **For child lots,** provided that our recommendations related to child lots are also adopted (e.g., ownership requirement).
- **For bona fide tenant housing,** provided that recommendations related to tenant houses are also adopted. *[ Subcommittee is uncertain about status of tenant lot discussion, but agrees that there should be a tenant house recommendation, and that it should be that a parcel for a tenant house can never be subdivided by any means from the parent parcel ].*
- **For properties where there has been in a significant investment in testing for sand mounds prior to the adoption of these new restrictions** (specific criteria for these grandfathering provisions are addressed below).

## **GROUP DISCUSSION AND RECOMMENDATIONS**

A sand mound is an on-site sewerage disposal system elevated above the natural soil surface. The mound system, on average about 35 feet wide, 90 feet long, and 5 feet high, can sometimes be used to overcome site limitations which would preclude the use of other traditional, underground trench type sewage disposal systems. Such site limitations include high water tables and shallow soils over bedrock. A sand mound system cannot be used unless the requirements for slope, permeability, and other design features are satisfied. However, there are properties that can develop using mound systems that could not be developed using conventional underground “trench” systems. For example, where a trench system could not be approved anywhere on a 250 acre farm near Poolesville, sand mounds systems might allow the approval of three houses.

**Assuming an equal number of houses and septic systems**, sand mounds are more environmentally friendly than traditional septic systems. The sand provides a medium where aerobic bacteria can digest sewage effluent efficiently. Soil below the mounds provide for additional water treatment. There are no documented failures of sand mounds in Montgomery County. The maintenance of sand mounds is very similar to that of traditional septic systems.

Developers prefer using trench systems if they can accommodate the same number of units as sand mounds. Trench systems are invisible to the casual observer and costs approximately \$10,000. Sand mounds are raised slightly above ground and cost approximately \$30,000. Where landowners know the limited suitability of their soils for trench systems, they may choose to use sand mounds to avoid excessive perc testing or to provide easier location of sites than is often possible for trench systems. Because a sand mound can function in more areas than trench systems, the technology offers more options for the location of lots on any given property.

### **Background on Sewer-Related Zoning Strategies**

The Planning Board and Council in selecting zones have historically considered the availability of sewer and the feasibility of septic systems in determining the appropriate zoning for land in rural zoning. Where public sewer is available, the zoning is generally set at the maximum density intended. In those zones where sewer is not generally available (the RDT zone, the Rural zone, the Rural Cluster zone, and the RE-2 zone (2-acre zoning)), the ability of the land to perc has been considered as part of the zoning/density decision. Where the soils are poor, the zoning has typically been set at higher density than desirable over the entire property on the assumption that the full density will not be achieved. This was done to provide some flexibility for property owners with difficult soils to locate units where feasible on smaller lots and to avoid an unnecessarily complex zoning pattern.

Although this zoning strategy is important in considering potential development if the RDT zone, it was used extensively outside the RDT zone. The use of sand mounds or other previously unanticipated technologies could significantly increase density over that projected in the County’s residential wedge and even in suburban communities, particularly in areas zoned RE-2. There are close to 2,000 acres of RE-2 land, 98 percent of which are not served by public sewer. The average lot size for those RE-2 properties not served by public sewer is 0.22 acres (about 1



unit per 5 acres), approximately half of what is theoretically allowed. If these properties could build at their theoretical maximum, the density could double, resulting in approximately 400 additional houses. (It is important to note that using sand mounds does not automatically allow for full build-out since there is no assurance that all RE-2 land will perc even for sand mounds.) Our findings and recommendations on this matter may therefore be particularly relevant to land outside the Agricultural Reserve.

Individuals have claimed that the intent of the 1980 Agricultural Master Plan was to limit the use of septic systems as a means to limit achievable density in RDT-zoned land. We did not believe that it was a productive use of our time to debate whether language in the Master Plan or subsequent actions constitute an intent to either limit density to less than one unit per 25 acres or to permit it, but instead focused on what the policy should be going forward.

## RELEVANT LAWS, REGULATIONS, AND POLICIES

### State Law/Regulation

The Maryland Code discusses sand mounds twice. In one section, the State Code defines a sand mound disposal system as a conventional system for the coastal plain physiographic province<sup>23</sup> and in a different section defines a sand mound septic system as an innovative/alternative septic system for a grant program.<sup>24</sup> **State regulations define a sand mound system as a “conventional on-site sewage disposal system”.**<sup>25</sup> State regulations require the County to allow an on-site sewage disposal system if it determines that the site and proposed design can safely dispose of sewage and conform to applicable laws and regulations.<sup>26</sup> State law also requires Montgomery County to adopt a 10 year water and sewer plan<sup>27</sup> that is consistent with the applicable master plan.<sup>28</sup>

### County Regulation/Policy

#### Ten-Year Comprehensive Water Supply and Sewerage Systems Plan

As noted above, State law requires the County to adopt a water and sewer plan that is consistent with all applicable master plans. The latest County Ten-Year Comprehensive Water and Sewerage Plan was approved in 2003. While the Water and Sewer Plan does not explicitly mention sand mound systems, it does state that properties in the RDT zone are “not intended to be served by community systems.” The Water and Sewer Plan makes case-by-case exceptions where community service is “logical, economical, environmentally acceptable, and does not risk extending service to non-eligible properties.”<sup>29</sup>

---

<sup>23</sup> MD Code, Environment Article, § 9-216(a), (b)(1)(iii). Montgomery County is in the piedmont physiographic province.

<sup>24</sup> MD Code, Environment Article, § 9-1401(b)(2)(i).

<sup>25</sup> Code of Maryland Regulations (COMAR), § 26.01.02.01.

<sup>26</sup> COMAR, § 26.04.02.02(L)

<sup>27</sup> Maryland Code, Environment Article, § 9-515.

<sup>28</sup> *Id.*, § 9-505(a)(1).

<sup>29</sup> Montgomery County Ten-Year Comprehensive Water Supply and Sewerage Systems Plan, (2003) page 17.

## 1980 Preservation of Agriculture & Rural Open Space Functional Master Plan

The 1980 Functional Master Plan recognizes that availability of sewer may limit achievable density. Therefore, the Plan recommends that a comprehensive “policy regarding the private use of alternative individual or community sewerage systems outside of the sewer envelope.”<sup>30</sup> Although sand mounds were viewed as alternative in 1980, the Master Plan does not specifically state that sand mounds are alternative systems. The Master Plan also made several sewer-specific recommendations, including the following:

- Do not use public sewer service for the entire Study Area within 20 years from the date of adoption.
- Deny public water and sewer service in the RDT zone.
- Deny private use of alternative systems in the RDT zone, except for public health reasons.
- Consider some rural communities and villages for alternative systems to increase low-cost housing and for public health reasons.<sup>31</sup>

## Montgomery County Regulations

The Code of Montgomery County Regulations (COMCOR) references the specifications set forth in State regulations that a sand mound must meet.<sup>32</sup>

## Regulatory History

At the time of the adoption of the Master Plan for the Preservation of Agriculture and Rural Open Space, sand mounds were not a conventional septic system. As noted above, the Water and Sewer Plan recommended prohibiting innovative systems. In 1986, Maryland regulations included sand mounds as a conventional system. Montgomery County did not permit sand mounds as a conventional system until executive regulations were amended in 1994. During the initial administration of the executive regulations, sand mounds were a “last resort” option. An applicant had to demonstrate that a trench system would not work before a sand mound system would be considered. Now there are no limitations on sand mounds other than the physical requirements for a workable system. In 2005, a bill was introduced by Councilmembers Perez and Praisner to temporarily prohibit the approval of sand mounds. The Council deferred consideration of this bill, pending the report of the Ad Hoc Working Group. This bill is discussed in the pending legislation section of this report. Attached on © \*\*\*\*\* is a memorandum for a March 30, Transportation and Environment Committee meeting on the proposed legislation. This memorandum has several useful attachments. *Group members, you can find this attachment in your sand mound packet.*

---

<sup>30</sup> Preservation of Agricultural & Rural Open Space Functional Master Plan, page 17 (1980).

<sup>31</sup> *Id.*, at 61-62.

<sup>32</sup> COMCOR, § 27A.00.01.

Although other counties in Maryland vary some sand mound specifications, (e.g., percolation and system size) no Maryland County restricts the use of sand mounds for agricultural preservation reasons because of State law.

## ACTIVITY UNDER THE EXISTING LAW

### Approved Subdivisions and Systems

The Department of Permitting Services estimates that there are 75 sand mound systems in operation throughout the County in all zones. As of March 2006, the Planning Board has approved 127 preliminary plans of subdivision in the RDT zone since 1988. Approximately 11% (14) of those subdivisions relied upon sand mound systems either wholly or in part. These subdivisions created 45 single-family lots that could be platted utilizing sand mounds; 18 of those lots now have houses on them. Forty-one of those lots are for new dwelling units; 4 lots are existing dwellings on these properties that utilized a sand mound for a new septic reserve field established as part of the development process. Of these 41 lots, 23 sand mound systems are approved but not constructed (15 via one plan). (For perspective on this number, 851 lots have been recorded in the RDT zone since 1978.)

Sand mound systems are also allowed on lots and parcels that do not need to go through the subdivision process and are not counted in the subdivision numbers. Tenant houses, existing structures, and existing lots may also use sand mounds without going through the subdivision process. Since 1999, 45 sand mounds have been constructed in the RDT zone (including those that have gone through subdivision and those exempt). Of those 45 mounds, 11 of them (or 24%) were for repairs to existing homes.

## OPTIONS AND GROUP RECOMMENDATIONS TO REMEDY THE PROBLEM

It is unclear whether current law permits the County to limit the use of sand mounds since current state law permits sand mounds (i.e., does the state law pre-empt the County from enacting a law that prohibits or limits the use of sand mounds). We concurred with the recommendation of Council staff to not delve into this complicated legal issue. Rather, we focused on what is the best policy for the County to implement at this stage. **We recommend that the Council investigate the legal ramifications of our recommendations and identify the appropriate legal strategy to implement them.**

Although we have been told that Councilmembers historically assumed that septic available would limit density to less than zoning, some Group members believe this intent is not clear and provides a significant source of confusion for property owners. **In the future we believe that the Planning Board and Council should select zones that better reflect the desired density, rather than assume that septic limitations will control density. *Please confirm that you believe this reflects the Group's intent.*** Subcommittee not sure, full group needs to affirm if this is true and how to say it.

We considered a range of options for sand mounds ranging from a complete prohibition to no restriction on use, with many options in between.<sup>33</sup> This was one of the most difficult issues for the Group to consider because we have fundamentally different views about the rights of property owners. Some members strongly believe that that land owners are entitled to develop at one unit per 25 acres and that no limit should be placed on a technology that could help achieve that goal. Others equally strongly believed that it was not the intent of the Master Plan to allow sand mounds or development at one unit per 25 acre and that every effort should be made to limit development.

The Group worked especially hard to find a position that would be acceptable to all members. While some members do not embrace this option, we recommend it as an appropriate way to curb the number of sand mounds while still providing some potential for their use.

**We recommend the County continue allowing limited use of sand mounds.**

**We recommend that sand mounds be allowed under the following conditions: One sand mound per 25 acres for the first 75 acres. Beyond that, one sand mound should be allowed for every 50 acres of land. *Note that this was the last option discussed by the Group – but there was not vote or formal affirmation so we would like Group members to confirm that this is your recommendation.*** This option would not reduce development potential for the small property owners, while at the same time would result in a 22% percent decrease in the total number of potential sand mounds in the Agricultural Reserve.

| Acreage       | Number of Sand Mounds | Number of properties in size range | Gross of potential sand mounds | Net of potential sand mounds * |
|---------------|-----------------------|------------------------------------|--------------------------------|--------------------------------|
| 25<50         | 1                     | 17                                 | 17                             | 1                              |
| 50<75         | 2                     | 14                                 | 28                             | 25                             |
| 75<100        | 3                     | 32                                 | 96                             | 86                             |
| 125<175       | 4                     | 18                                 | 72                             | 69                             |
| 175<225       | 5                     | 8                                  | 40                             | 40                             |
| 225<275       | 6                     | 9                                  | 54                             | 54                             |
| 275<325       | 7                     | 9                                  | 63                             | 63                             |
| 325<375       | 8                     | 5                                  | 40                             | 35                             |
| 375<425       | 9                     | 3                                  | 27                             | 27                             |
| 425<825       | 10-17                 | 0                                  | 0                              | 0                              |
| 825<875       | 18                    | 1                                  | 18                             | 18                             |
| <b>TOTALS</b> |                       | 116                                | 455                            | 433                            |

\* Net number of sand mounds is the total potential minus existing

<sup>33</sup> Three options which were discussed at length were to limit sand mounds to one sand mound per 50 acres, to limit every property, regardless of size, to 5 lots with sand mounds ( a minor subdivision) and the recommended option of allowing 3 sand mounds for the first 75 acres and beyond that, one sand mound per 50 acres.

development on the property. [table a bit confusing - where is the 22% reduction?]

**In addition, we recommend allowing sand mounds under the following circumstances:**

- **Where there is an existing house and the sand mound would not result in the development of an additional house.** Situations in which this may occur include where there is a failing septic system or the need to create a new reserve field for an existing home. We believe property owners should be able to use the best technology to serve existing homes and address failures.
- **When it enables the property owner with an approved deep trench perc to better locate potential houses to preserve agriculture.** Under this scenario the property owner must first obtain the approval of the Department of Permitting Services for a deep trench system perc. We suspect that the circumstances in which a property owner will want to pay for the additional cost of a sand mound will be limited, but we believe this should be an option for an owner wanting to protect land for agricultural purposes. Once a landowner uses a sand mound to relocate a house, the unused perc cannot be used for an additional residential development.
- **For child lots,** provided that our recommendations related to child lots are also adopted (e.g., ownership requirement- see Chapter X).
- **For farm tenant housing.**

*Subcommittee thinks we went further and should go further on tenant houses, and we refer this back to full group. This section is not sufficient.*

Further work should be undertaken to ensure that tenant homes are occupied by those who work on the farm and not built with the intention of reselling the house. One option is to create a new prohibition against separating property with tenant homes from the rest of the property.

- **Grandfather provision.** Any property owner who has submitted a Water Table Application and conducted testing of water table holes between January 1, 2000 and October 1, 2006 is not limited by any new restrictions, provided that record plats for the property are approved by December 31, 2009. (This date should be approximately 3 years after the change in sand mound regulations and should be adjusted based on the date of the new regulations). *Note that the Group asked DPS staff to suggest a point at which a grandfather provision would apply. This is the new language per DPS's recommendations. Subcommittee feels a full group discussion of grandfathering is needed. the DPS suggestion was discussed but was somewhat controversial.*

## **NEXT STEPS**

Council legal staff should coordinate with Planning and Executive legal staff to conduct legal research to determine what changes in law or regulations are necessary to accomplish the report's recommendations. Changes to the Ten- Year Comprehensive Water and Sewerage Plan

will certainly be necessary. The first task of this group should be to resolve outstanding questions related to state preemption.

## **BUILDING LOT TERMINATION PROGRAM**

### **INTRODUCTION**

While the County reports more than 48,000 acres of land preserved through TDR easements, that land is limited by easement only to uses permitted in the RDT zone and in the number of dwelling units to be allowed. In most cases this number is one for each 25 acres, the same as the zoning limit. It has been the practice of the Agricultural Services Division and Planning Board to recommend that the landowner retain a TDR for each 25 acres not already built upon as a potential building lot. Thus, a substantial number of potential building lots remain viable in the Agricultural Reserve. It is important to provide an incentive to keep a considerable amount of the land under the TDR easements in farming. To meet the goal of preserving land for farming and preventing fragmentation of the Reserve, some method of compensating landowners for the value of those development TDRs must be found. We recommend a Building Lot Termination Easement as one of the tools to accomplish this goal.

### **OVERVIEW**

The target of the BLT program is those unused building lots that either have been or can be created on the RDT zoned ground. Simply put these unused lots, along with the retained TDRs and approved septic fields that make them viable as building lots, shall be eliminated for future development by the execution of an agricultural easement on the land on which the lots or potential lots are located. The land owner will be paid fair compensation for the termination of the lot(s).

### **WHO IS ELIGIBLE?**

A landowner's property is eligible if:

- There exists a retained TDR with the parcel for each lot to be terminated
- All excess TDRs on the parcel are severed
- There are at least 25+ acres in the offered parcel or the offered parcel is contiguous to land already protected by Ag Easement
- At least 50% of the property has Class I, II or III soils
- The property is in the RDT Zone and outside water and sewer Category 1, 2 or 3
- The property must not be encumbered by any other State or County Ag Easement with the exception of TDR Easements
- Only lots entitled by zoning density will be permitted. Child lots are excluded from the program
- The Property Owner must provide a letter from DPS evidencing that the Lot(s) being terminated has an approved soil test(s) for a septic system. (\* It is recommended by the subcommittee that there be a corresponding drawing identifying the location of the approved field so that it can be identified within the Ag Easement as unavailable for future use.)

- Landowner must include entire parcel in the BLT Ag Easement to eliminate all or the designated number of buildable lots.

### **VALUATION**

The Department of Economic Development shall annually establish the average value for a building lot in the RDT zone by acquiring appraisals from at least three (3) qualified appraisers requesting their market evaluation of a building lot in the RDT zone. These appraisals shall account for the fact that the land owner will keep fee ownership of the land after the building lot right is terminated. The average of the appraisals will be used to establish the price as determined by the County Executive to be paid per terminated building lot in each fiscal year. The set value will not differentiate between lots based on their location or the quality of the building site. The appraisals will also determine the residual value of the Property once the easement is acquired.

### **PROCEDURE**

- The Landowner will apply to the Department of Economic Development (DED) demonstrating that they are eligible under the above stated criteria
- The DED Agricultural Services Division will review applications to assure eligibility criteria are met and the application is complete.
- The Agricultural Preservation Advisory Board will review applications for recommendations to the Director of the DED.
- The County Attorney will evaluate applications and approve the Contract and Easement documents.
- The package will then be sent to the County Executive for action.
- At settlement, the landowner will be paid in cash. Our recommendation is that, when available, non-residential TDRs could be added to the program so that they can be provided to the property owner in lieu of cash or as a component to the consideration paid under the BLT Program. Any Development TDRs not otherwise converted under the program to non-residential TDRs should be terminated.

### **PRIORITIZATION**

- Establish a cap of applications, based on available funding, which will be accepted during BLT purchase periods
- Rank applicants on a list in the order in which they are received
- Conduct a second ranking based upon size of property;
- Place applications for BLT easements received after the closing of a purchase period or after exceeding the application cap on a waiting list for future consideration.



## **FUNDING**

- Public:
  - (A) Initially through Agricultural Transfer Taxes - FY2007 \$8,204,000 and FY2008 \$6,346,000 (for all farmland preservation program initiatives and DED estimates that \$5.5 million would be available for the BLT)
  - (B) Identification of new Public Fund Sources (Dedicated Tax for Farmland Preservation and /or General Obligation Bonds)
- Private:
  - (A) Creation of Super TDR program - Development of receiving capacity for commercial/R&D/mixed uses for TDRs. We recommend that when the commercial receiving areas are available, the DED offer non-residential TDRs as part of the Purchase Price for the landowners applying to the BLT Program.

## **QUESTIONS**

- Do sand mounds not otherwise permitted to create a lot qualify for the BLT Program?
- Should we impose a cut off date on parcel configuration to limit lots earned by reconfiguration?
- Should the County recycle residential TDRs to become Commercial TDRs?
- Should TDRs acquired by the County be kept by the County as a potential funding source?

## **TRANSFERABLE DEVELOPMENT RIGHTS PROGRAM, INCLUDING TRACKING**

### **SUMMARY**

**ISSUE:** What changes to the Transferable Development Rights (TDR) program are warranted to strengthen the program? There is a lack of receiving areas to accommodate the number of TDRs available to be sent from land zoned Rural Density Transfer (RDT). We believe that the TDR program is essential to the preservation of the Agricultural Reserve and that changes are necessary to keep the program strong.

We recommend the County Council enact the following changes to the current TDR program:

- Provide for TDR receiving capacity in floating zone applications/local map amendments.
- Provide for TDR receiving capacity in mixed-use zones.
- Provide for TDR receiving capacity in commercial and industrial zones (including Research and Development zones). We recommend that TDR capacity in commercial zones be used to fund the proposed building lot termination (BLT) TDR program. *Group members – from your conversation it appears you want TDRs included in zones other than traditional “commercial” zones. You did not expressly identify industrial zones, so please let us know if that is your intent.*
- Master plans should more aggressively seek to maximize the number of receiving areas.
- The County should work with local municipalities to establish inter-jurisdictional TDRs to create receiving areas in municipalities.
- Eliminate the requirement in single family zones that receiving areas use 2/3 of the possible TDRs.
- Reintroduce legislation to prevent property owners from selling all TDR easements and simultaneously locating a private institutional facility (PIF) on the property.

Additionally, we recommend further study of options to require a supermajority of Councilmembers to increase density in the Agricultural Reserve and/or require Council approval before the Executive could terminate a TDR easement.

We received briefings from the County Planning Department on the status of a system to track the use of TDRs and are satisfied that improved TDR tracking is under way and that the planned TDR tracking system should meet future TDR information needs.

## GROUP DISCUSSION AND RECOMMENDATION

### RELEVANT LAWS AND REGULATIONS

The County established the Transferable Development Rights (TDR) program to provide landowners compensation for the downzoning that reduced the density allowed for a property in the Rural Density Transfer (RDT) zone from one house for every five acres to one house for every 25 acres. Provisions allowing the sale of development rights from the RDT zone are found in § 59-C-9.6. Provisions allowing the purchase of TDRs in receiving areas are found in various sections of the Zoning Ordinance and are not referenced here. For a complete description of how the TDR program operates, see Chapter x [the BLT chapter]. See Appendix x for a glossary of terms used in this chapter.

### ACTIVITY UNDER THE EXISTING LAW

To date, the County has placed 48,000 acres of land in the Agricultural Reserve under easement via the TDR program. Planning Department analysis shows that since 1981, Montgomery County's TDR program has severed<sup>34</sup> approximately 9,668 TDRs from properties in the RDT zone. Of the 9,668 TDRs that have been severed, 5,923 have been transferred to receiving areas by recording a subdivision plat. Conversely, 3,730<sup>35</sup> TDRs have been severed, but for various reasons have not been attached to a receiving area by recording a subdivision plat.

In August 2005 the Planning Department's Research and Technology Division undertook a comprehensive update of TDR sending and receiving areas. According to that analysis, there are a total of 10,200<sup>36</sup> TDRs that can be transferred from the sending area. Of the 10,200 TDRs that can be transferred, **there are approximately 2,122 TDRs that can still be sent.** As of August 2005, there were 8,077 TDRs on approved preliminary or site plans. The remaining capacity of TDRs in receiving areas is 2,046. Based on past experience, Planning Staff estimate that between 40% and 60% of this remaining capacity will be used. Using that date, they estimate **a deficit of between 894 and 1,304 of TDR receiving areas.**<sup>37</sup>

In 2001, the Planning Board authorized and convened a Task Force to recommend changes to the TDR program. This Task Force was composed of representatives from varied segments of the County and affected branches of the County government. The Task Force recommended several changes to the TDR program intended to revitalize the program, but none were implemented.

---

<sup>34</sup> Severed means "to be recorded by easement among the land records of Montgomery County". See Appendix x. A severed TDR is a TDR that is no longer attached to the sending property.

<sup>35</sup> There is a discrepancy between the total number of TDRs severed and the number of those extinguished plus those that have not equaling 15 TDRs. Planning Department staff is still in the process of "cleaning" the data and expects to resolve this number in the near future.

<sup>36</sup> Of the 10,200 TDRs that can be created, there is evidence that approximately 9,000 TDRs have been created, leaving approximately 1,200 TDRs yet to be created in the sending area. The Planning Department estimated receiving areas to have land zoned to accommodate 15,336 TDRs, but two thirds of the receiving areas have been developed and no longer have capacity and those that have been built out have used two-thirds of available TDR capacity.

<sup>37</sup> These figures were composed before the Council approved the Shady Grove Sector Plan and the Damascus Sector Plan, which both added some TDR receiving areas.

The Task Force proposed policy, regulatory, and information changes to the TDR program. A summary of the Task Force recommendations appear in the Appendix on page X. Where appropriate, we note where our recommendation is similar to the Task Force recommendations. The Task Force reported their recommendations to the Planning Board in 2002; therefore this chapter refers to this Task Force as the 2002 TDR Task Force.

## GROUP RECOMMENDATION TO REMEDY THE PROBLEM

We believe the current TDR program is essential to the preservation of land in the Agricultural Reserve and should be strengthened to provide additional opportunities for property owners to sell their TDRs. There are not enough receiving areas to support the TDRs that remain to be sent from the RDT zone. We strongly support identifying new receiving areas for the existing TDR program while at the same time creating a mechanism and receiving areas for a new TDR program whereby commercial owners will purchase the developable or buildable TDR.

**We recommend the County Council enact the following changes to the current TDR program:**

- **Provide for TDR receiving capacity for increasing density in floating zone applications/local map amendments.** Although TDRs have traditionally been applied through Euclidian zones, we believe that floating zones that increase density provide an appropriate opportunity for additional TDRs. We note that the 2002 TDR Task Force recommended this policy as well. We believe that this should be a high priority.
- **Provide for TDR receiving capacity for commercial and industrial zones (including the Research and Development zone).** Land in commercial and industrial zones rezoned for an increase in allowable density provides significant potential for new receiving areas. Assuming the County implements the BLT program, **we recommend commercial receiving areas be reserved to create new TDR capacity for the BLT program** (see chapter x). We believe this should be a high priority. We note that the 2002 TDR Task Force recommended residential uses by right in certain commercial zones through the use of TDRs. *Group members – from your conversation it appears you want TDRs included in zones other than traditional “commercial” zones. You did not expressly identify industrial zones, so please let us know if that is your intent.*
- **Provide for TDR receiving capacity for mixed-use zones.** Mixed-use zones are used extensively in the most dense areas of the County (central business districts – Silver Spring, Bethesda and Friendship Heights) and near transit stations. Although the County Council has begun putting TDRs on the resident portion of two mixed-use zones (the transit oriented mixed-use zone and the town center mixed-use zone), it has not placed TDRs on the commercial portion of mixed-use zones or considered whether to add TDRs to the central business district (CBD) zones. Both provide significant opportunities that should be realized. We note that the 2002 TDR Task Force recommended the creation of TDR receiving areas with density bonuses in some mixed-use zones.<sup>38</sup>

---

<sup>38</sup> The TDR Task Force recommended TDR receiving areas be created in Central Business District (CBD), Transit Station, Town Center, and the higher density residential and mixed-use zones using in the vicinity of transit stations.

***Follow-Up Required:*** How should TDRs in mixed-use zones be used? If TDR receiving areas are expanded to the commercial portion of mixed-use zones, should these new receiving areas be reserved for the excess TDRs (the current program), or for buildable TDRs (see Chapter x for an explanation of the difference between the two types of TDRs).

- **Master plans should more aggressively to maximize the number of receiving areas.** We believe that the County Council should adopt a policy whereby in any master plan if a site is recommended for increased density, there should be an assumption that the increased density should be through the use of TDRs, unless there is a compelling reason not to require TDRs. We believe the burden of proof should be to prove why TDRs are inappropriate on a particular site, rather than to prove why TDRs are warranted.
- **The County should work with local municipalities to establish inter-jurisdictional TDRs to create receiving areas in municipalities.** We believe that inter-jurisdictional TDRs present a way to increase the number of receiving areas and prevent the loss of receiving areas on property that may be annexed. Since Rockville is in the process of revising its zoning ordinance, this may present an opportunity to establish this program. Because there is little direct benefit to municipalities for placing TDRs on properties within their boundaries, we believe that the County may need to develop incentives to encourage their participation (or consequences for failure to participate). We note that the 2002 TDR Task Force recommended this policy as well.
- **Eliminate the requirement in single family zones that receiving areas use 2/3 of the possible TDRs.** The Zoning Ordinance requires that development using TDRs must use at least “two-thirds of the number of development rights permitted to be transferred to the property under the provisions of the applicable master plan approved by the district council.”<sup>39</sup> We believe that eliminating this provision may actually *increase* the use of TDRs, especially on small or constrained properties where it is impossible to use two-thirds of the possible TDRs. We note that the 2002 TDR Task Force recommended reducing or eliminating the two-thirds requirement.<sup>40</sup>
- **Reintroduce legislation to prevent property owners from selling all TDR easements and simultaneously locating a private institutional facility (PIF) on the property.** In Chapter x, we discuss the merits of a zoning text amendment that would have prevented properties owners from selling all easements and locating a PIF on a property. This text amendment expired on October 31, 2006 and we recommend that a similar amendment be reintroduced. See Chapter x for details.

### **TDRs for Affordable Housing and Senior Housing**

The 2002 TDR Task Force recommended that TDRs be required to significantly increase the number of housing units for the elderly and affordable housing. Because of the complexity of these issues and the competing policy objectives of these programs, we do not recommend

---

<sup>39</sup> Montgomery County Zoning Ordinance, § 59-C-1.393(b). This requirement may be waived by the Planning Board only if it finds that it would be desirable for environmental or compatibility reasons.

<sup>40</sup> The TDR Task Force recommended reducing the two-thirds requirement to one quarter when the TDR receiving zone density is at least 10 dwelling units per acre and eliminating the requirement for properties of five acres or less when the TDR receiving zone capacity is 20 dwelling units per acre or less.

pursuing these issues as a high priority. While we do not recommend abandoning consideration of these concepts, we believe our other recommendations related to the TDR program should be implemented first.

### **Zoning in the Agricultural Reserve**

Individuals have expressed concern that a future Council may decide to change the zoning in the Agricultural Reserve, resulting in increased density. Not only could this impact property not yet under easement, but it is possible that existing easements could be revoked.

TDR easement restrictions on density remain in effect until terminated. A termination of an easement requires agreement on behalf of the landowner and the County. If the Council decided to increase density in the Agricultural Reserve, it is possible that the Executive could also take actions to terminate these easements. **We recommend that further consideration be giving to requiring a supermajority vote of the Council to increase density in the Agricultural Reserve and/or requiring Council approval before the Executive can terminate an agricultural easement.**

***Follow-Up Required:*** Legal research should be conducted to determine how these changes could be legislated. Requiring a supermajority for a change in zoning would probably require a change to the State Regional District Act. Further work should be done to determine whether restrictions on the ability to terminate easements are an easier way to address this issue.

### **Additional Issues to Consider**

***Group members:** the following issues were included in the larger list of follow-up items previously circulated to the Group. We think that it makes more sense to put TDR related issues here, rather than with the longer list of miscellaneous follow-up issues.*

There are at least two issues that may warrant further consideration, but because of time constraints we were unable to pursue them further.

1. Should RDT land owners be allowed to hold onto development rights indefinitely or should a time limit be set? If a date certain is set by which land owners must sell all development rights, then the County may need to establish a TDR bank to purchase outstanding development rights and sell them to property owners in receiving areas at a later time.
2. Should the County set up a new TDR bank to facilitate the buying and selling of TDRs? Once the bank has run out of development rights to sell, it could still collect funds from property owners who want to use TDRs and use those funds to promote agricultural programs.

# **TDR TRACKING**

## **Introduction**

Tracking TDRs involves recording the status of the TDR from the time it is severed from the land by easement, through the sale of the TDR recorded by deed, and until the TDR is extinguished by use in a preliminary plan and subsequent recording on a subdivision plat. TDRs that are severed from the farmland by easement can be held by the landowner or sold to another party. The buyer of the TDR can also hold, sell, or use the TDR as a means of increasing density elsewhere in the County.

Once a TDR is severed from the land, an easement is recorded.<sup>41</sup> The easement records the date, TDR serial number, tax identification number associated with the parcel, acreage of the parcel, grantor and grantee of the easement, location of the parcel, number of dwelling units on the parcel, TDR capacity of the parcel, and the number of TDRs being severed. A distinct liber and folio (book and page) for the easement assigned by the County are also recorded.

If the TDR is sold, a deed will record additional information relevant to tracking the TDR. The deed records the sale date, the buyer and seller of the TDR, the number of TDRs sold, the TDR serial number, the liber and folio of the easement that severed the TDR, the liber and folio of the deed, and frequently, the location and description of the parcel from which the TDR was severed.

Additional information used to track TDRs comes from the County Tax Assessors Office. This information includes current acreage of the parcel, number of dwelling units on the parcel, improvements to the parcel, the tax identification number of any child lots associated with the parcel, as well as the landowners name and address. This data is used as a cross reference to the data supplied by the County Attorney's Office.

Consolidation of the above data creates a data file for all parcels that create/sever a TDR indexed by tax identification number. This data is matched to Planning Department data on preliminary plan information. If a TDR is extinguished by use on a preliminary plan, the preliminary plan number is attached to the file and recorded for each individual TDR.

## **Improved TDR Tracking**

For Fiscal Year 2007, the County Council directed the Montgomery County Planning Department to develop a comprehensive record of TDRs from creation through final use. With improved tracking, the County should be able to know at any point in time how many TDRs have been created, are left to be created, have been used, and other statistics. Additionally, the County should be able to look up TDR-related information about any parcel and be able to verify that TDRs are being created, sold, and used in accordance with the provisions of the TDR program.

---

<sup>41</sup> The Montgomery County Attorney's Office records all easements and deeds that are created in the County. This is the primary source of data on TDRs.

By November 2006, the Planning Department had made significant progress in completing this task and reported their progress to us. The Planning Department has completed the comparison of TDR information in the County Attorney's records to those in the Planning Department's Development Review database (Hansen), to make sure both records match. The goal is a complete record in Hansen of sending parcel TDR information, and this goal is virtually complete (there are some outstanding questions for a few records). The Planning Department is currently creating a Geographic Information Systems (GIS) layer of land under TDR easement. This layer is tied to the TDR database in Hansen.

The Planning Department indicates that further work on TDR tracking will focus on parcels that have used TDRs (i.e., receiving areas). It is performing a quality assurance check of all TDRs that have been recorded on a subdivision plat. This process is somewhat more complicated than for sending areas because there is not a comprehensive reference for receiving parcels analogous to the County Attorney's record of created/sent TDRs. When this quality assurance is finished, Planning Department staff intends to add to the TDR GIS layer those receiving parcels where TDRs have been used.

Once the accounting and mapping of receiving parcels is complete, the County will have a system for tracking each TDR recorded from origination from the sending parcel to its being extinguished by final use on a receiving parcel. This combination of Hansen database and GIS layer will allow easy access for checking the status of any individual TDR or any sending or receiving parcel. It will allow status reports to be run when needed for policy analysis or TDR program evaluation. It will also allow County staff an easy method for determining if TDR use in any particular case is being conducted in accordance with the rules of the program (e.g., ensuring that a new landowner cannot create and sell TDRs that have already been sold by a previous landowner).

### **Group Discussion**

We received two briefings from the Planning Department on the status of tracking the sale of TDRs. We are satisfied that improved TDR tracking is well under way and that the planned TDR tracking system, if implemented properly, will meet future TDR information needs. We understand that the progress on TDR tracking is the result of high levels of coordination among staff from several public agencies, including the County Attorney's Office, the Department of Economic Development, Park and Planning, and the State Tax Assessor's Office. We are encouraged by this coordination and support staff's review to determine whether any additional, or more formalized, arrangements for data transfer and review are needed. We support the creation of a TDR tracking manual to document the tracking procedures that have been established, and recommend that the Planning Board transmit an annual TDR status report to the County Executive and County Council. ***Group members – this was not explicitly recommended by the Group. This is new language suggested by Planning staff. Please let us know if you support this language.***



## **NEXT STEPS**

The Planning Department should draft text amendments to amend the TDR program to provide for TDR receiving capacity in floating zones and commercial, industrial, and mixed-use zones; eliminate the requirement that receiving areas use two-thirds of the possible TDRs.

The Planning Department should create a new component of the TDR program that will create commercial receiving areas eligible to purchase buildable TDRs. It should also recommend whether receiving areas in mixed-use zone will support the existing TDR program or the new component for buildable TDRs.

The Planning Board and the Council should implement our suggested policy that maximizes the number of receiving areas identified in master plans (i.e., assume for purposes of master plans that if a site is recommended for increased density, the additional density should be through the use of TDRs without a compelling reason to depart from this assumption).

The Planning Department should begin working with municipalities to develop an inter-jurisdictional TDR program.

The Planning Department should finish the necessary steps they have identified to complete implementing a system to track the use of TDRs, and begin submitting annual TDR reports to the Council.

Council Legal staff, with input from Executive and Planning Legal staff, should identify and evaluate strategies to require a supermajority of the Council to approve any increase in density in the Agriculture Reserve and/or require Council approval before an easement can be terminated.

## **PENDING LEGISLATION**

### **SUMMARY**

**ISSUE:** Should the Council enact legislation pending as of October 31, 2006 related to private institutional facilities, sand mounds or public sale of development rights? Although all pending zoning text amendments (ZTAs) expired on October 31 pursuant to state law, we discussed any legislation, including ZTAs, pending as of October 31, 2006 that related to the Agricultural Reserve.

We recommend the Council enact legislation similar to ZTA 05-23 to prohibit landowners from building Private Institutional Facilities (PIFs) if they have sold all of their TDRs or their land is under easement. We generally recommend that further work be done to determine how to decrease the potential TDRs for sale on a property once a PIF has located on the property. Finally, we recommend that the Council continue to monitor the development of PIFs in the Agricultural Reserve to determine whether any further changes are needed in the future.

## **GROUP DISCUSSION AND RECOMMENDATION**

### **I. COUNCIL ACTION RELATED TO PRIVATE INSTITUTIONAL FACILITIES**

Private institutional facilities (PIFs) (e.g., private schools, places of worship), are allowed uses in the Rural Density Transfer (RDT) zone. Since many of these uses may serve regional needs, they may be quite large and require a large land area. Because PIFs often have limited financial resources, they have increasingly been locating in the Agricultural Reserve where land is generally less expensive. This has generated concern that PIFs would take large tracts of land out of agricultural use. A range of options have been considered to address this problem, including limits on impervious surface (large PIFs typically have significant amount of land covered by buildings, parking lots, and driveways), denying requests for public sewer and water service and limiting the size of permissible septic systems.

The Council recently enacted two changes in law and regulation that limit the growth of PIFs in the RDT zone. First, it amended the Ten-Year Comprehensive Water Supply and Sewerage Systems Plan to prohibit the extension of public water and sewer services for PIFs in RDT zoned property. Therefore, all future PIFs on RDT zoned property are limited to private sewerage treatment systems. Second, the Council limited private multi-use sewerage disposal systems for non-agricultural uses in the RDT zone to 600 gallons of effluent per day for any housing unit and no more than 4,999 gallons of water per day for any given property. On a practical basis, the maximum size multi-use system creates an upper limit on the maximum total size of structures allowed.

## **A. ZTA 05-23, TDR EASEMENT – NONRESIDENTIAL USES**

On December 13, 2005, ZTA 05-23 was introduced to require TDR easements to limit future development of non-residential and non-agricultural uses (“non-agricultural” is hereafter referred to mean all uses except residential and agricultural uses). In addition, ZTA 05-23 would prohibit a property developed with a non-agricultural use from participating in the TDR program. ZTA 05-23 has now lapsed.

### **Group Recommendation**

**We recommend the Council introduce and enact legislation to specifically limit the use of parcels under TDR easements to single family and agricultural uses. This would strengthen the easement to preclude PIFs on land not currently protected from such uses.** Most of the PIF's require a special exception in the RDT zone, a zoning procedure that allows conditions to be imposed upon the use. We urge the Council to explore legal mechanism address the issue of linking TDRs with PIFs. **We further recommend the Council enact legislation prohibiting landowners from building PIFs if they have sold off of their TDRs or their land is under easement. [NB: THE SUBGROUP RECOMMENDS THE GROUP INSERT THE FOLLOWING LANGUAGE:** There should be a linkage between the multi-use systems in the 10 year Water and Sewerage Systems Plan and Chapter 59 of the Zoning Ordinance to provide definitive guidance on how TDRs would be handled when PIF uses are being pursued on properties encumbered by TRD easements, but have development rights remaining. **We believe no future TDR sales should be permitted.]**

The second impact of ZTA 05-23 is to prohibit a property developed with a PIF from selling any TDRs, regardless of the size of the PIF or the property (e.g., a large property with a small PIF structure would be prohibited from selling any TDRs). While we support the concept of decreasing the potential TDRs for sale once a PIF has located on the property, we believe that additional work must be completed to determine the legality of reducing the TDRs for sale, and the relationship between the size of the property, the size of the PIF and the number of TDRs. If the PIF use is located on an unencumbered property in the RDT zone, then the future transfer of TDRs from those properties should be prohibited. The size of the PIF would conform to the multi-use septic policy based on the dwellings the property would yield.

Additional consideration should be the question of the construction of a PIF can and should limit future sales of TDRs if a property owner has not sold all of his or her TDRs, and how many TDRs should be retained in order to construct a PIF on the property. The follow up work needed to address the second issue should not delay passage of the provision discussed earlier that would prevent a landowner whose land is under easement from subsequently locating a PIF on the property. If necessary, the issues should be considered in two separate text amendments.

## **B. ZTA 05-15, IMPERVIOUS SURFACE LIMIT REQUIREMENTS FOR THE RE-2, RE-1, RURAL, RC & RDT ZONES**

On October 3, 2005, ZTA 05-15 (first introduced in December 2004 as ZTA 04-27) was

introduced to limit all impervious surfaces that are not related to agriculture to 15% in the RDT zone and 20% in the RC, RE-2 and RE-1 zones. An impervious surface is a hard surface area that prevents or substantially impedes the natural infiltration of water into the underlying soil. Examples of impervious surface include buildings, decks, patios, parking areas and all paved surfaces such as driveways, roads, sidewalks, tennis courts, and basketball courts. ZTA 05-15 has now lapsed.

### **Group Recommendation**

**We recommend against enacting legislation similar to ZTA 05-15 at this time.** Since introduction of ZTA 05-15, the Council has passed legislation and changes to the Ten-Year Comprehensive Water Supply and Sewerage Systems Plan that prevent the proliferation of large PIFs in the Agricultural Reserve. Any effort to move forward on this legislation must be considered with an agricultural exemption that holds agricultural uses harmless. We believe that the Council should continue to monitor the construction of PIFs in the RDT zone to determine whether any further changes are needed, but a limit on imperviousness does not appear necessary at this time.

## **II. OTHER PENDING LEGISLATION**

### **A. EXPEDITED BILL 38-05, SEWAGE DISPOSAL – SEPTIC SYSTEMS – TEMPORARY PROHIBITION**

Expedited Bill 38-08 was introduced on November 8, 2005, to temporarily prohibit the use of mound systems or any innovative or alternative individual septic systems for new construction until July 31, 2006. Specific recommendations on sand mound use are being recommended by the Ad Hoc Advisory Committee which should address the concerns raised by Council making a temporary prohibition unnecessary.

### **Group Recommendation**

**We recommend not enacting legislation similar to Expedited Bill 38-06.** In Chapter x, we recommend alternative legislation that would limit, but not prohibit, sand mounds. If the alternative legislation is enacted, we do not believe that this legislation is necessary to reduce potential development in the Agricultural Reserve. **We recommend [insert date] as the date to allow sand mounds to go forward until the legislation is enacted.**

### **B. BILL 38-04, AGRICULTURAL LAND PRESERVATION – PUBLIC SALE OF DEVELOPMENT RIGHTS**

Bill 38-04 was introduced on November 9, 2004 to authorize the sale of County-owned TDRs. The purpose of such a sale was to “provide the opportunity for buyers to gain access to development rights when privately-owned development rights are not available.” This legislation has now expired.

### **Group Recommendation**

**We recommend against enacting legislation similar to Bill 38-04.** Current statistics indicate that there is a shortage of TDR receiving areas in the County. We believe that increasing the supply of TDRs would not only reduce the price that private landowners receive for TDRs but would also put the county in direct competition with private landowners who had TDRs to sell. The transfer of privately held TDRs into bona fide TDR receiving areas must remain a County priority.

# **RIGHT-TO-FARM LEGISLATION AND EDUCATION STRATEGIES**

## **SUMMARY**

**ISSUE:** Does the County need to pass additional legislation to protect a farmer’s “right-to-farm”? As suburban communities expand into rural communities, conflicts can arise between farmers who want to farm the land and neighbors who expect suburban standards for noise, odors, etc. Conflicts can also arise between farmers and other farmers. These conflicts can interfere with agricultural activities.

### **I. RIGHT-TO-FARM LEGISLATION**

We recommend that the County Council enact legislation that requires potential homebuyers of homes in agricultural zones to be notified of laws that protect farmers from certain nuisance claims. If the number of complaints increases, we would recommend the Council explore whether additional action is necessary.

### **II. EDUCATION STRATEGIES**

In addition to disclosure, we also recommend that the County explore options to educate residents about the importance of the Agricultural Reserve.

## **GROUP DISCUSSION AND RECOMMENDATIONS**

### **RELEVANT LAWS AND REGULATIONS**

“Right-to-farm” legislation is often adopted as a response to nuisance complaints between farmers and their neighbors. An excerpt from the State legislation is reproduced below. Since Montgomery County does not have a “nuisance ordinance”, Council staff has perused the County Code and identified legislation that is relevant to the broad category of nuisance law. These excerpts appear below.

#### **State Law**

State law provides for the following protections for farmers from nuisance claims:

- (c) Operation continued for 1 year or more. If an agricultural operation has been under way for a period of 1 year or more and if the operation is in compliance with applicable federal, State, and local health, environmental, zoning, and permit requirements relating to any nuisance claim and is not conducted in a negligent manner:
  - (1) The operation, including any noise, odors, dust, or insects from the operation, may not be deemed to be a public or private nuisance; and
  - (2) A private action may not be sustained on the grounds that the operation interferes or has interfered with the use or enjoyment of other property, whether public or private.<sup>42</sup>

#### **County Law**

##### **Zoning Ordinance**

Section 59-C-9.23 of the Montgomery County Zoning Ordinance sets forth the intent of the RDT zone. This section states that “[a]griculture is the preferred use in the [RDT] zone. *All agricultural operations are permitted at any time, including the operation of farm machinery*”<sup>43</sup>.

##### **Air Quality**

Chapter 3 of the Montgomery County Code, entitled “Air Quality”, generally prevents an individual from burning refuse or plant life outside of a building without a permit and limits the purposes for which a permit may be issued. Section 3-8(c)(1) allows the Director of the Department of Environmental Protection to issue a permit for agricultural open burning.

---

<sup>42</sup> Maryland Code, Courts and Judicial Proceedings, § 5-403(c).

<sup>43</sup> Montgomery County Code, § 59-C-9.23 (emphasis added).

Section 3-9(a) states that “[a] person must not cause or allow the emission into the atmosphere of any gas, vapor, or particulate matter beyond the person’s property line or unit if a resulting odor creates air pollution.”<sup>44</sup> The County Code does not contain a provision exempting farmers from the general odor provisions of the Code.

### Erosion, Sediment Control, and Stormwater Management

Chapter 19 in the County Code, entitled “Erosion, Sediment Control, and Stormwater Management”, provides that “[i]f illegal pollutant discharges from properties engaged in agriculture impair aquatic life or public health, cause stream habitat degradation, or result in water quality standards or criteria violations, the Department must pursue correction of these violations . . .”<sup>45</sup> This section specifically addresses agricultural operations and there is no exemption.

### Noise Control

Chapter 31B of the County Code, entitled “Noise Control”, provides the standards for acceptable levels of noise during both the day and night times. Table 1 below summarizes the general standards related to acceptable noise levels in the agricultural zones.

**Table 1: Maximum Allowable Noise Levels in the Agricultural Zones**<sup>46</sup>

|  | <b>Daytime</b><br>(decibels) | <b>Nighttime</b><br>(decibels) |
|--|------------------------------|--------------------------------|
| Land zoned in agricultural zones* where the owner <b>has not</b> transferred the development rights. | 65                           | 55                             |
| Land zoned in agricultural zones* where the owner <b>has</b> transferred the development rights.     | 67                           | 62                             |

\* The agricultural zones are Rural, Rural Cluster (RC), Rural Density Transfer (RDT), Rural Neighborhood Cluster (RNC), Rural Service (RS), and Low Density Rural Cluster Development Zone (LDRCDZ).<sup>47</sup>

Section 31B-10 includes a relevant exception. Section 31B-10(a)(1) states that the Noise Control chapter does not apply to “agricultural field machinery used and operated in accordance with the manufacturer’s specifications”.<sup>48</sup>

### Pesticides

Chapter 33B of the County Code, entitled “Pesticides” regulates the use and distribution of pesticides. The definitions section exempts agricultural land from the requirements in that section.<sup>49</sup>

<sup>44</sup> Montgomery County Code, § 3-9(a).

<sup>45</sup> Montgomery County Code, § 19-51(c).

<sup>46</sup> Montgomery County Code, §§ 31B-2(l)(1)-(2), 31B-5(a)(1).

<sup>47</sup> Montgomery County Code, § 59-C-9.1.

<sup>48</sup> Montgomery County Code, § 31B-10(a)(1).

<sup>49</sup> Montgomery County Code, § 33B-1 defines *lawn* as excluding agricultural land.



## Solid Waste

Chapter 48 of the County Code contains laws related to solid waste. Section 48-22 prohibits people from hauling refuse into the County without a permit. Provisions in this section exempt fertilizer and stable manure used for agricultural purposes from this general prohibition.<sup>50</sup>

## **ACTIVITY UNDER THE EXISTING LAW**

As suburban communities expand and abut agricultural land, conflicts may arise between farmers who wish to continue their farming and non-farmers who want to preserve the use and enjoyment of their property. Conflicts can also arise between farmers. These conflicts can involve complaints about “odor, flies, dust, noise from field work, spraying of farm chemicals, [and] slow moving farm machinery.”<sup>51</sup>

Currently, complaints are filed with the Department of Environmental Protection (DEP). Staff from DEP indicate that the number of complaints filed, while not “common”, have increased as development in the Upcounty area has increased. According to DEP’s data, in the past 10 years (through May 2006), DEP has only recorded 25 complaints in the Agricultural Reserve. About half of those were illegal dumping complaints, which would not be addressed in right-to-farm legislation.

Council staff performed a cursory online search that did not identify current Maryland court opinions addressing nuisance claims related to agricultural land and farming in Maryland. The lack of reported judicial opinions is not surprising given the strong state language that protects farmers from nuisance lawsuits.

## **OPTIONS AND GROUP RECOMMENDATIONS TO REMEDY THE PROBLEM**

The Group discussed the following options:

1. Do nothing
2. Enact Right-to-Farm Legislation
3. Enact Legislation Requiring Disclosure Requirements

## **I. RIGHT-TO-FARM LEGISLATION**

We do not support the “do nothing” approach because Group members are concerned that if residential development in the Agricultural Reserve increases, the potential number of complaints against agricultural operations could increase. Nor do we support enacting right-to-farm legislation for two reasons: (1) we feel that current County and State law adequately

---

<sup>50</sup> Montgomery County Code, § 48-22.

<sup>51</sup> Janie Hipp, “Balancing the Right to Farm with the Rights of Others”, page 1 (National Public Policy Education Conference, 1998).

protects farmers from nuisance lawsuits;<sup>52</sup> and (2) we reviewed data compiled by the DEP that indicates that there is not a widespread problem. However, if the Council does opt to enact right-to-farm legislation, **we recommend the Council exclude the use of grievance procedures because these procedures tend to favor homebuyers and be costly for farmers.**

**We recommend that the Council enact legislation requiring disclosure for homes being sold in agricultural zones informing potential homebuyers of current County and State law that protects farmers from nuisance claims.** We feel that this approach may reduce the number of complaints lodged against farmers by increasing the awareness of homebuyers that current laws protect farmers from agricultural-related complaints. If the number of complaints lodged against farmers continues to increase despite a disclosure notice, **we would recommend that the Council explore whether additional action is required to protect farmers.** If additional action is needed, some Group members suggest the Council pass a resolution affirming the right of farmers to farm in the Agricultural Reserve.

***Follow-Up Required*** At what stage of the home buying process should this disclosure be required (e.g., when a contract is signed, at closing, etc.)? What form should the disclosure take?

## **NEXT STEPS**

The County Council should enact legislation requiring disclosure for homes being sold in agricultural zones informing potential homebuyers of current County and State law that protects farmers from certain nuisance claims related to farming.

## **II. EDUCATION STRATEGIES**

**We recommend that the County invest in an education campaign to inform County residents of the importance and location of the Agricultural Reserve.** Group members suggest the following campaign strategies be considered: signs indicating the boundaries of the Agricultural Reserve, pamphlets, events, a “speaker on call” list, coordination with Montgomery County Public Schools, special programs for after-school children’s groups and seniors, public service announcements, an advertising campaign, cable TV programming, a website, expanding the cooperative extension service, and expanding the Agriculture History Farm Park. We feel the existing Agricultural committees should be involved in the development of this educational campaign.

## **NEXT STEPS**

The Department of Economic Development should work with the Agriculture community to develop an educational program designed to inform County residents of the importance of the Agricultural Reserve.

---

<sup>52</sup> See discussion on pages 2 and 3.

## ADDITIONAL AGRICULTURE ISSUES

The Council's resolution establishing the Ad Hoc Agricultural Working Group intentionally limited the scope of the Group's work. The purpose of this list is to identify issues not specifically identified in the resolution that we believe requires further work. We feel that a comprehensive review of policies and laws related to the Agricultural Reserve is necessary and our goal is to identify the full range of issues that should be considered. Due to time constraints, however, we were unable to address these issues with the exception of design standards which we briefly discussed as noted below. *Group members – which, if any, of these issues should be priorities? Do we want to add any issues? Remove any issues? Also note that some of the follow-up issues previously on the list have been moved to the appropriate chapter and are not reproduced here again.*

## DESIGN STANDARDS

Design strategies would guide the location of residential lots created in the RDT zone to maintain farmable areas and minimize the impact of residences. The size of the lot, the need for septic treatment and the ability to use private roads also impact location/design. Placement of homes on the land may have a more important impact on retaining rural character than lot size, especially at the low density of the RDT Zone.

## ACTIVITY UNDER THE EXISTING LAW

The County does not currently have provisions for design standards for clustering, home placement, or for allowing more lots on private roads in the RDT zone. Existing law requires that lots in the RDT zone be a minimum of 40,000 square feet. The Rustic Road Functional Master Plan recommends placement of buildings to protect view sheds.

## GROUP RECOMMENDATION TO REMEDY THE PROBLEM

We did not discuss specific options related to design strategies because of time constraints, **but we recommend the Planning Department further explore options to reduce fragmentation of agricultural land by locating buildings to preserve viable farmland.** Options could include design standards, clustering, the use of private roads, etc. We believe that if developed properly, these strategies could be an important tool. However, if these strategies are not developed properly, they could run counter to the underlying goal of reducing farmland fragmentation. (For example clustering for environmental purposes has sometimes led to a recommendation to place houses in the middle of productive land to protect forested areas.)

We believe that efforts to identify potential strategies should involved property owners and must be cognizant of the prior tensions between the Planning Department and rural property owners on this issue. **We recommend that the Planning Department consider using existing agricultural advisory groups to help develop these strategies.**

We further believe that any strategy must maintain property owner equity and achieve the goal of preserving farmland, which may sometimes conflict with other County policies (e.g., forest conservation). Several Group members believe that incentives should be provided to encourage, rather than mandate, location strategies. Some Group members believe strongly that the incentives should not include additional density, while other Group members believe that additional density should be considered as a potential incentive.

## **GENERAL QUESTIONS**

1. What role can non-profit entities play in the effort to keep land as farmland, (rather than being converted for residential development)?
2. Do any of the needed policy changes require an amendment to the Master Plan for the Preservation of Agriculture and Rural Open Space or can all needed modifications occur through changes to the Zoning Ordinance and other County laws?

## **ZONING-RELATED**

3. Should the uses and/or special exceptions allowed in the RDT zone be limited or expanded (e.g., to limit institutional uses or allow children's day camps)? Should the County designate additional areas for the "Rural Service Zone"?
4. Should new development standards/zoning be created or used for developments and subdivisions in the RDT zone (e.g., to allow smaller lots, require rural preservation design standards, etc.)?
5. Should public road requirements be changed to allow more dwelling units to access private drives in rural areas (Planning Department page 7)?

## **TENANT HOMES**

6. Should there be new requirements to ensure that the ownership of tenant homes is not transferred to individuals not employed on the farm?
7. Should the number of tenant homes be limited?

## **RUSTIC ROADS**

8. What changes are needed regarding roads in the Agricultural Reserve and rustic roads in particular?

## **ECONOMIC HEALTH OF THE AGRICULTURAL RESERVE**

9. What changes are needed to the County's efforts to monitor the economic health and evolution of the agricultural industry in the County and to County programs to promote the health of this industry? (Note that this question is intended to address issues unrelated to land use.)
10. How can the County ensure a focus on sustainable agriculture and not just the preservation of farmland?
11. What additional analysis is needed of changing trends in farming and opportunities for alternative/small scale farming?
12. How should the County monitor and react to the impact on farming from environmental legislation and deer management? Are changes required or needed?

**SUBSTANTIVE CHANGES MADE TO DRAFT  
SECTIONS OF THE REPORT MADE BY REVIEW SUB-GROUPS**

**I. Changes recommended by Sub-Groups**

**A. Contrary to Minutes**

1. **Design Standards:** Sub-group recommends deleting the word “cautiously” from the recommendations. The approved minutes for July 24 stated that the Group “cautiously agreed that another entity should address” design standards.
2. **Child lots:** The sub-group believes that the approval for public water could be handled administratively if the criteria for approval are made clear. Draft minutes for November 6 reflect that the Group recommends requiring Council approval to extend public water.
3. **Child lots:** The sub-group questions whether there should be a minimum acreage required to create a child lot. The approved minutes for October 23 indicate that the Group specifically did not believe it was necessary to have a minimum acreage requirement for a create a child lot.
4. **Pending Legislation:** The sub-group edits would recommend prohibiting property from selling TDRs if a PIF is located on a property not encumbered by a TDR easement. The approved minutes of October 23 indicate that the Group agreed further work should be done to consider the link between the **number** of TDRs relinquished and the **size** of the non-residential uses.” The Group questioned was not sure whether the presence of a PIF should eliminate sales of TDRS in all circumstances (e.g., where a small PIF is located on a large property).
5. **Introduction:** The sub-group recommends language changes to principle #4. At the last meeting, the Group talked at length about the wording and agreed to specific language.
6. **BLT:** Priorities – the sub-group supported the DED proposal to use receipt date and size of property to rank applications. Several group members objective to these criteria and the Group previously did not reach consensus on what the priorities should be.
7. **BLT:** The sub-group removed the recommendation that allowed the County to spread payments over more than one tax year. Instead, the sub-group states the Group recommendation as requiring payment in cash at the time of settlement.

## **B. Expands upon the recommendations presented in the minutes**

1. Child lots: The sub-group believes the ability to rent a child lot home should be allowed for bona fide hardship cases (e.g., foreclosure, death of child, serious incapacity, call-up for military service). Staff believes that there was very brief discussion of this issue but no clear decision.
2. BLT: Sub-Group stated that BLT applicants should submit a letter from DPS evidencing the lot has an approved soil test (and a document mapping where the soil field is). The Group had previously broadly stated that the landowner has to provide some assurance that the landowner has a buildable lot, but did not identify the means to which the landowner must prove the perc. The staff draft identified this as a follow-up issue.
3. BLT: The sub-group has a requirement that the BLT participant include an entire parcel in the BLT easement to eliminate all or the designated number of buildable lots.
4. BLT: The sub-group has a recommendation for valuation and procedure, the Group did not discuss or agree to these, though it was in the presentation to the Group.
5. Pending Legislation: Sub-group recommends adding a sentence to the recommendation that allows sand mounds to “go forward” until the sand mound recommendations are passed.
6. Sand Mounds: The sub-group recommends sand mounds be allowed under the listed circumstances, “provided that a subdivision of a parcel existing as of December 1, 2006 shall not operate to increase the number of sand mounds allowed for the original parcel.”

## **C. Deletes text in Chapter**

1. BLT: Deletes description of TDR basics; goals and purposes of the BLT program; discussion of alternatives ways to determine compensation; suggested follow-up to determine the assumed lot size to establish value and how other building structures (e.g., PIFs) fit into the BLT program; and the section labeled “next steps”.
2. Pending Legislation. Deletes next steps.

## **II. Sub-Groups Recommendations for follow-up discussion**

1. **Child lots:** Should a landowner’s child (i.e., the owner of the child lot) be allowed to lease the house to another family member?

2. **Child lots and TDRs:** How will TDRs used for child lots be disposed of?
3. **Child lots:** Should there be a maximum size for a child lot?
4. **Child lots:** The sub-group believes there should be clarification on how the recommendation requiring a majority of land be preserved for agriculture would work (i.e., what impacts would this have? How would the percentage be calculated?).
5. **Sand Mounds:** The sub-group believes there needs to be a discussion of tenant housing as it relates to sand mounds and a general recommendation/discussion about tenant housing.
6. **Sand Mounds:** The sub-group believes the full Group needs to confirm the Group recommendation for not using septic as a way to control density
7. **Sand Mounds:** Sub-group suggests that the Group discuss the grandfathering provision.
8. **BLT:** The subgroup identifies 4 questions (it is unclear whether the Group or a future entity is supposed to answer these questions):
  - Do sand mounds not otherwise permitted to create a lot qualify for the BLT program?
  - Should the Group impose a cut off date on parcel configuration to limit lots earned by reconfiguration?
  - Should the County recycle residential TDRs to become commercial TDRs?
  - Should TDRs acquired by the County be kept by the County as potential funding source? (This question is in the staff draft as a necessary follow-up issue.)

### **III. Inconsistencies Between Chapters**

Staff did not find any direct inconsistencies but notes that an explanation of the basics of the TDR program that was included in the BLT chapter was deleted by the sub-group working on this chapter. Since it is referenced in several other chapters, the Group will need to decide whether the basics of the TDR program should be included elsewhere in the Report or whether these references need to be changed.



## MEMORANDUM

December 5, 2006

TO: Scott Fosler, Co-Chair, AD HOC Agriculture Policy Working Group

FROM: Shondell Foster, Research Associate  
Jeff Zyontz, Legislative Attorney

SUBJECT: Other Jurisdictions Use of TDRs to Preserve Farmland

This memo responds to your request to examine the experiences in other jurisdictions with the agricultural preservation issues addressed by the working group. The American Farmland Trust's last comprehensive national survey was published in January 2001. At that time, 60% of the land with TDR easements in the country was located in Montgomery County.

- 1) There are approximately 50 jurisdictions in the United States that use TDRs. Montgomery County's program has placed more easements on sending areas than all other programs combined. Most places that use TDRs allow more houses per acre than one house for every 25 acres, the base density allowed in the RDT zone. We found two jurisdictions using TDRs, both west of the Mississippi River that had zoning less dense than Montgomery County.
- 2) Although relatively few jurisdictions have a TDR program, many have a purchase of development rights program (PDR) also known as the purchase of agricultural conservation easements (PACE). PDR programs buy easements in exchange for a price paid, similar to the MALPF program in Maryland.
- 3) Some jurisdictions provide for "child lots" even when land is under TDR easements. Some of these easements limit the number of child lots that can be created by each land owner. We did not find any jurisdictions, however, that allowed the creation of new lots in excess of existing zoning, such as Montgomery County's child lots. There are other jurisdictions that permit previously recorded lots to develop.
- 4) Some jurisdictions limit the size of residential lots that can be created. Some jurisdictions limit the percentage of land area in residential lots or only allow lots that do not diminish the viability of the land to support agriculture. Some jurisdictions limit both the size of the lot and the percentage of land that can be used for agriculture.
- 5) We did not find any jurisdictions that limit the type of septic system allowed for the purpose of reducing the number of potential houses. We focused on jurisdictions in Maryland for this topic.

Council staff interviewed and reviewed the ordinances and easements of other programs around the country. The following describes our findings.

## Interviews

The following chart summarizes the information that was gathered from other jurisdictions that have successful agricultural preservation programs, suggested by Judy Daniel and the American Farmland Trust- Farmland Information Center.

In compiling this chart, three preliminary questions help to identify the counties that most resemble Montgomery County's farmland preservation program:

1. How would you describe the pressure to develop farms into commercial or residential use?
2. Does your county control the conversion of farmland to developed land (either commercial or residential) by zoning or purchased easement?
3. Does your county give farm landowners transferable development rights to sell?

All jurisdictions surveyed are currently subject to strong pressures to develop farmland into commercial or residential use except one. The New Jersey Pinelands is the only region not subject to development pressure because the Pinelands area is protected under state and federal law.

In areas where land is regulated by the county government, zoning is rarely used exclusively but is often used along with purchased easements as means of controlling the conversion of farmland into developed land. For example, Boulder County, Colorado uses zoning but is most effective in controlling farmland conversion through purchased easements.

The question of whether the jurisdiction used transferable development rights provided many different responses. Several counties were not included in the chart because the TDR programs they used helped to preserve open space, and not specifically agricultural land.

Of the jurisdictions included in the survey, only Boulder County, Colorado indicates that their TDR program actively serves as an incentive to preserve farmland. This is in contrast to Blue Earth County, Minnesota where the impetus for farmers to participate in their TDR program is to gain substantial profits, even though in theory it preserves farmland. The other counties identified have TDR programs that are difficult to implement since land use is regulated by municipalities and participation in TDR programs is optional among municipalities.

In addition to the chart, the list of Local Governments with TDR Programs compiled by the American Farmland Trust- Farmland Information Center is also attached.

### Survey for Agricultural Preservation

How would you describe the pressure of farms to develop into commercial or residential uses?

| Jurisdiction  | Strong | Moderate | Weak |
|---|--------|----------|------|
| <i>Blue Earth County, WI</i>                                    | X      |          |      |
| <i>Boulder County, CO</i>                                       | X      |          |      |
| <i>Buckingham Township, Buck County, PA</i>                     | X      |          |      |
| <i>Burlington County, NJ</i>                                    | X      |          |      |
| <i>Dane County, WI- especially around urban areas (Madison)</i> | X      |          |      |
| <i>Lancaster County, PA</i>                                     | X      |          |      |
| <i>Loudon County, VA</i>  | X      |          |      |
| <i>Michigan State</i>   | X      |          |      |
| <i>New Jersey Pinelands</i>                                     |        |          | X    |
| <i>Vermont State</i>  | X      |          |      |

Do you control the conversion of farm land to development mostly by zoning or purchased easements?

| Jurisdiction   | Zoning | Purchased Easements | Other |
|--|--------|---------------------|-------|
| <i>Blue Earth County, WI</i>   | X      |                     |       |
| <i>Boulder County, CO-most effective through purchase easements but primarily zoning</i>   | X      |                     | X     |
| <i>Buckingham Township, Buck County, PA- uses <b>both</b> zoning and purchased easements</i>   |        |                     | X     |
| <i>Burlington County, NJ-municipalities have authority over land use but controls water use</i>  |        |                     | X     |
| <i>Dane County, WI- try to influence through zoning but municipal annexation makes it difficult</i>                                    | X      |                     |       |
| <i>Lancaster County, PA uses both zoning and purchased easements</i>   |        |                     | X     |
| <i>Loudon County, VA – some land is zoned while other land restrictions are choices by the land owner to place land under easement</i> |        |                     | X     |
| <i>Michigan State (mostly) a little farmland is controlled through purchase easements</i>  | X      | X                   |       |
| <i>New Jersey Pinelands</i>  | X      |                     |       |
| <i>Vermont State</i>   | X      |                     |       |

Do you give farm land owners transferable development rights to sell?

| Jurisdiction   | YES | NO |
|--|-----|----|
| <i>Blue Earth County, WI-</i> are not used to preserve farmland but more to help farmers sell more land and make more money  | X   |    |
| <i>Boulder County, CO-</i> used as an incentive to conserve farmland and open space  | X   |    |
| <i>Buckingham Township, Buck County, PA</i>  | X   |    |
| <i>Burlington County, NJ-</i> only two municipalities have participated since late 1980s early 1990s. Used by open space landowners and not agricultural land owners | X   |    |
| <i>Dane County, WI-</i> does have a Farmland Preservation Program that gives tax credits to land owners that have their land zoned exclusively for agriculture       |     | X  |
| <i>Lancaster County, PA-</i> some townships have TDRs but TDRs do not cross municipal boundaries   |     | X  |
| <i>Loudon County, VA-</i> does have purchase development rights  |     | X  |
| <i>Michigan State</i>  |     | X  |
| <i>New Jersey Pinelands-</i> but difficult to implement because the commission does not have authority in townships and municipalities                               | X   |    |
| <i>Vermont State</i>   | X   |    |

#### Ordinance Review

Transfer Development Rights (TDR) is a program that is accepted across the country, but difficult to implement. TDR's often require the sponsorship by a County but participation is optional for townships and municipalities. In addition, receiving sites usually must remain within the township or municipality in order for the development rights to transfer.

Municipalities often do not contain both farm areas and urbanized areas in sufficient quantity for a successful program. Jurisdictions that do implement TDR programs vary the application of the program; the number of TDRs a landowner may transfer vary; the density the landowner may develop the land and what provisions are placed on the sending parcel varies. The following chart summarizes how the ordinances of various jurisdictions across the country implement TDR programs.

## TDR Ordinances

### 1. If the land converts to residential uses, how many houses per acre are allowed?

|  |   |
|--|---|
| Blue Earth County, MN  | In the A Agricultural District- no more than four dwellings per 40 acres; In the C Conservation District- no more than one dwelling unit per 40 acres.  |
| Boulder County, CO   | 1 per 35 acres; over 140 acres, 2 per 35 acres  |
| Cape Elizabeth, ME<br><i>Density depends on how the development is connected to certain types of sewage</i>  | 1 per 20,000 sq. ft. of net residential area- public sewage system<br>1 per 40,000 sq. ft. of net residential area- on site sewage disposal when transferred from an abutting parcel or parcel has the same ownership<br>1 per 50,000 sq. ft. of net residential area- when transferred from parcel located within 2000 ft of developed parcel<br>60, 000 sq. ft. of net residential area- when transferred from parcel located more than 2000 ft of developed parcel |
| Charles County, MD<br><i>Three development credits will be subtracted for each dwelling located on a parcel in the Agricultural Land Preservation District</i> | 1 per 3 acres   |
| King County, WA<br><i>Ranges depending on the zone</i>   | Urban separator & R-1 Zone- 4 dwelling units per acre; RA Zone (inside forest)- 1 dwelling unit per 5 acres; A-10 & A-35- 1 dwelling unit per 5 acres; F Zone- 1 dwelling unit per 80 acres or 1 dwelling unit for each lot btw. 15 to 80 acres   |
| Marin County, CA   | <i>Does not mention the density</i>   |
| Township of Lumberton, NJ  | 1 dwelling unit per 2 acres   |
| West Hempfield Township, PA  | 1 per 25 acres if the land was zoned in the Rural Agriculture District or Rural Residential District prior to 3/14/1978; if land is zoned in either of these districts after 3/14/1978, density is determined by total acreage: If land is between 2 to 50 acres- 1, 50 to 75 acres- 2 lots, 75 to 100- 3 lots, 100 to 125- 4 lots, etc...  |

2. How many TDRs can they transfer?

|   |  |
|---|--|
| Blue Earth County, MN   | Agriculture District- development rights may be transferred to a contiguous 40 acres in the A district, upon obtaining a conditional use permit<br>Conservation District- development rights may be transferred to a contiguous 40 acres upon obtaining a conditional use permit   |
| Boulder County, Colorado<br><i>Up to 140 acres, 1 TDR may be retained</i> | 2 per 35–52.49 acres; 3 per 52.5–69.9 acres; 4 per 70–87.49 acres; 5 per 87.5–104.9; 6 per 105–122.49 acres; 7 per 122.5–139.9 acres; 2 per 35 acres for 140+;   |
| Cape Elizabeth, ME  | <i>Transfer rates are not in zoning</i>  |
| Charles County, MD  | <i>Transfer rates are not in zoning</i>  |
| King County, WA   | 1 per 1 acre minus the acres of submerged land and any land being retained for development on the site   |
| Marin County, CA  | <i>Transfer rates are not in zoning</i>  |
| Township of Lumberton, NJ   | A formula uses the septic suitability of soils; based on this number a TDR amount is determined for the parcel and 1 TDR credit is subtracted from the TDR amount for each single family unit existing on a given parcel at the time the section is adopted.   |
| West Hempfield Township, PA   | The maximum number of dwelling units permitted is determined by the Open Space Design Option provisions in the district the tract is located multiplied by five (5) if in the Rural Agricultural district.<br>If in the Rural Residential district- .067 multiplied by the area of the tract of land minus 3 (at least) to allow for one retained TDR. |

3. Are there any special provisions for clustering/design or grandfathering/child lots?

|                          |  |
|--------------------------|--|
| Blue Earth County, MN    | <p>If the land existed as a whole parcel as of October 1, 1992, large tracts of land may be divided into no less than 40 acre parcels without going through the subdivision process.</p> <p>If the land is already divided in parcels less than 40 acres, one lot may create one lot, for every 40 acres, without going through the formal subdivision process so long as the owner has not previously split the property and no other residential lots exist within the 40 acres. Any and all subsequent divisions must go through the subdivision process.</p> |
| Boulder County, Colorado | <i>None mentioned</i>  |
| Cape Elizabeth, ME       | <i>None mentioned</i>  |
| Charles County, MD       | A covenant in the instrument of transfer restricts the sending parcel from subdividing unless for it is for agricultural purposes.   |
| King County, WA          | Land that is in one zone may only be developed through a clustering subdivision, short subdivision, or binding site plan that creates a permanent preservation tract as large or larger than the portion of the subdivision set aside as lots.   |
| Marin County, CA         | <p>Clustering Requirements. In A districts (A3 to A60) and in ARP districts, non-agricultural development shall be clustered to retain the maximum amount of land in agricultural production or available for future agricultural use.</p> <p>Homes, roads, residential support facilities, and other non-agricultural development, shall be clustered on no more than five percent of the gross acreage, to the extent feasible, with the remaining acreage retained in agricultural production and/or open space.</p>  |

|                             |   |
|-----------------------------|---|
|                             | <p>Clustering shall be considered when applying for a TDR. Generally, structures should be clustered or sited in the most accessible, least visually prominent, and most geologically stable portion or portions of the site.</p> <p>In areas where usable agricultural land exists, residential development shall be clustered or sited so as to minimize disruption of existing or possible future agricultural uses.</p> |
| Township of Lumberton, NJ   | A parcel must be free from encumbrances prior to enrolling in the TDR program because once enrolled in the program the sending parcel is restricted to utilize the land only for farm, farm buildings and detached dwellings.   |
| West Hempfield Township, PA | Restrictive Covenant- the entire sending lot is restricted from any future development that is non-agricultural except where a TDR is retained on the sending lot.  |



## Easement Review

The ability to build one or more additional residences/dwellings onto a property after it has come under easement is an issue that is usually addressed at the beginning of the negotiation for the easement. Few jurisdictions actually have provisions in the easement that allow for the development of a “child lot.” More often, the Grantor will reserve land that does not come under easement because the language of the easement will expressly prohibit residential, commercial, or industrial development after the delivery of the deed of easement. The following is a summary of how various jurisdictions’ conservation easements allow or restrict residential development on the land that is subject to the easement.

### Issues:

1. What rights does a landowner retain after placing the land under easement?
2. What restrictions does the easement place on the land?

In **Pennsylvania**, the restriction that is placed on the land when a lot is under a Deed of Agricultural Conservation Easement is that construction or use of any building/structure after delivery of the deed is prohibited. The easement does provide for an exception: the construction of one additional residential structure is permitted if construction and use is limited to providing housing for persons who farm the land that is subject to the easement, no other structure has been built on the land since the delivery of the Deed of Easement, the residence and curtilage occupies no more than two acres of the property and the location of the residence does not diminish the economic viability of the land for agricultural purposes.

In addition, the land may be subdivided, however, the easement applies to all the subdivisions and it must state which of the subdivided parcels the residential structure is permitted. For all other parcels, no residence is permitted.

In **King County, Washington**, the Grantors of an easement reserve the right to use a limited number of single family units for the Grantor, the family of the Grantor, or agricultural employees. No more than a limited number of dwelling units in total will be permitted, even if the land is subdivided. One restriction placed on the land after it is under easement is that if the Grantor subdivides the land, the land may only be subdivided to less than 20 acres if a reserved homesite is attached to each parcel of the subdivided land and the reserved homesites on the parcels does not increase the density of housing on the land- using the total acreage prior to the subdivision, one reserved homesite per 35 acres. Another restriction is that no more than five percent of the land, or of any subdivided parcel, may be covered by structures and/or nontillable surfaces.

The **Commonwealth of Massachusetts** Agricultural Covenants do not reference the total number of residences permitted on the property under easement or whether the property is subject to the applicable zoning ordinance. However, the language in the covenant does allow the Grantor to construct a residence, driveway, septic system, any other underground sanitary system, or other utility for use by the Grantor or a family member of the Grantor who is actively

involved in the agricultural operations so long as the Grantor first obtains permission from the Grantee.

In **Marin County, CA**, subject to the current applicable zoning regulations for the property and government approvals, the Agricultural Conservation Easement allows the property to be developed up to a density of a limited number of single family residential dwelling units (Development Rights). The Grantor retains one Development Right that is applied to the existing residence(s) and all other rights to develop are extinguished. If the allowable development for the property increases, neither the Grantor nor the Grantee may receive such a benefit.

Land Preservation Easements in **Harford County, MD** allow the Grantor, at any time, to request a two acre or less lot exclusion for the exclusive residence of the Grantor. The Grantor and a child of the Grantor, at any time, may request the right to construct, use, or occupy a two acre or less lot exclusion for the exclusive residential use of that child. The child must verify the intent to live in the dwelling that is excluded. The total number of such lot exclusions may not exceed one lot per 25 acres contained in the easement.

Agricultural Preservation Easements in **Frederick County, MD** expressly prohibit land that is under easement from being developed, subdivided, or used for residential, industrial or commercial purposes unless it is approved by the Board. A Grantor may request, by written application, a personal covenant that would release free of easement restrictions 2 acres or less for the purpose of constructing a dwelling house for use by only the Grantor or the Grantor's child. The total number of lots may not exceed 4 lots of two acres or less with a maximum of no more than one lot per fifty acres. The Grantor also has an option of granting one two acre or less lot to another but then the Grantor does not have the ability to create any additional child lots.

In **Fayette County, KY** the Grantor, its heirs and assigns retain the right to construct single family detached dwelling(s), subject to prior approval from the Grantee. The language of the easement does not expressly state the total number of dwellings allowed, however it references the zoning and building ordinances as the controlling authority for the property. The Grantor may then construct, maintain, or reasonably expand any permitted new residence(s).

In **Delaware**, the Agricultural Lands Preservation Easement prohibits rezoning or major subdivision for land that is subject to the easement. The easement language does allow for the residential use of real property for the Grantor, the Grantor's relatives, and agricultural employees. The restrictions placed on the construction of residences are that any dwelling unit must be limited to no more than one acre per each 20 usable acres of land owned by the Grantor and a maximum of 10 acres of the Grantor's land is allowed for dwelling units.

According to the Deed of Easement in **New Jersey**, the Grantor is restricted from constructing a residence on the land unless it is to replace any single family residence that existed at the time of the conveyance (must be approved by the Grantee and the Committee). The Grantor may reserve an agreed upon number of residual dwelling site opportunities, which are defined as the potential to construct a residential unit and other appurtenant structures on the premises. The Grantor may also use, maintain, or improve a residential dwelling that is in existence at the time of

conveyance so long as it is consistent with agricultural, single and/or extended family residential uses.

The easement does not reference the size or density of the residual dwelling site and does not indicate whether the local zoning ordinance controls the development density of such site.

**Town of Dunn, Dane County, Wisconsin** Conservation Easements state the property may not be subdivided into smaller parcels. It is the intent that the property remains as a whole. However, the language of the easement also states that the Grantors may specifically reserve development rights, and such rights are not subject to the easement. The Grantor is permitted to maintain, improve, expand or replace the existing single family residential dwelling and accessory buildings so long as the total aggregate ground coverage of all buildings, other structures and improvements do not exceed 5% of the total acreage.

The easement does not reference the size or density of the residences and does not indicate whether the local zoning ordinance controls the development density of the land.

**Fauquier County, VA** prohibits subdivision, division, family transfer, boundary adjustment, or division of the property on land that is subject to an agricultural easement. In addition, the land is not permitted to have construction, placement, or maintenance of a structure or improvements, unless it existed prior to the deed conveyance, then it may be repaired, expanded or replaced.

Even though the property may not be subdivided into additional lots, no more than one single family dwelling may exist on each lot and only one secondary dwelling per parcel is permitted for a parcel that is 50, or more, acres. A secondary parcel may be established for a caretaker or tenant farmer. The maximum number of secondary dwellings for the entire property is four and the size of secondary dwellings cannot exceed 60% of the square footage of the primary residence. In addition, all buildings/structures cannot exceed two percent of the surface area of the property.

The easement does not reference the size of each lot and does not indicate whether the local zoning ordinance determines the density for the parcel.